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GOODEVE'S MODERN LAW

OF

REAL PROPERTY.

THE

MODERN LAW

OF

REAL PROPERTY

WITH AN APPENDIX CONTAINING

THE VENDOR AND PURCHASER ACT, 1874;
THE CONVEYANCING ACTS, 1881, 1882;
THE SETTLED LAND ACTS, 1882 TO 1890;
AND
THE MARRIED WOMEN'S PROPERTY ACT, 1882.

BY THE LATE

L. A. GOODEVE,

OF THE MIDDLE TEMPLE.

THIRD EDITION.

Revised and Partially Re-written

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PREFACE

TO THE THIRD EDITION.

Soon after the premature death of the Author, Mr. Louis Arthur Goodeve, a new Edition of his book on the Modern Law of Real Property was called for, and the present Editors were requested to prepare it, making such modifications in the work as would adapt it to the use of junior practitioners as well as of students, for whom it was primarily designed.

The fulfilment of this task has involved very extensive alterations in the Author's text as well as large additions thereto, and the present Edition includes some subjects not mentioned by the Author, and treats in detail of others which were only briefly noticed in the previous Editions. On the other hand, the Editors have considered that historical matter is out of place in a book which professes to expound the modern law, except where that law is not intelligible without some reference to history; and they have therefore thought themselves justified in substituting a mere outline of the theory of tenure for that part of the Author's Introduction which discussed in detail the subject of Tenure and the Feudal System.

The student should, of course, acquire some knowledge of these subjects before he attempts to master the details of the English Law of Real Property, as it now exists. The sources of fuller information on the history of the law than could be given

in such a work as the present are easily accessible, and some of them are indicated in the notes to the following pages.*

Melius est petere fontes, and it will be found that the Editors have introduced numerous references to Littleton, Coke, and other early authorities, in the place of, or in addition to, the more modern text-writers quoted by the Author. They have made much use of Cruise's "Digest of the Law of Real Property," of the valuable "History of the Law of Real Property," by Mr. Kenelm Digby, and of the learning of Mr. Challis's well known work.

They venture to hope that the present Edition of the Author's book preserves the merits which gained for it a place among the works recommended by the University of Oxford and the Council of Legal Education.

The Editors have to thank Mr. Paul Strickland and Mr. W. H. Coltman, both of Lincoln's Inn, for valuable help in the preparation of the present Edition.

H. W. E.

J. W. C.

* See p. 25, n. (*d*).

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LIST OF ABBREVIATIONS.

A. & E. Ad. & El.	Adolphus & Ellis's Reports.
Amb.	Ambler's Reports.
Anders.	Anderson's Reports.
App. Cas.	Appeal Cases (in the Law Reports).
Atk.	Atkyns's Reports.
B. (after a name)	Baron of the Exchequer.
B. & A. B. & Al. B. & Ald.	Barnewall & Alderson's Reports.
B. & Ad.	Barnewall and Adolphus's Reports.
B. & C.	Barnewall & Cresswell's Reports.
B. & S.	Best & Smith's Reports.
Bea. Beav.	Beavan's Reports.
Bing.	Bingham's Reports.
Bl. Bl. Comm.	Blackstone's Commentaries.
Bro. Ab.	Brooke's Abridgment.
Bro. C. C.	Brown's Chancery Cases.
Brod. & B.	Broderip & Bingham's Reports.
Bulst.	Bulstrode's Reports.
Burge, Comm.	Burge's Commentaries on Colonial and Foreign Laws.
Burr.	Burrows' Reports.
Burton, Comp.	Burton's Compendium of the Law of Real Property.
C. (after a name)	Lord Chancellor.
C. A.	Conveyancing Acts.
C. B.	Common Bench Reports.
C. B. N. S.	,, ,, ,, New Series.
C. M. & R.	Crompton, Meeson & Roscoe's Reports.
Camp.	Campbell's Reports.
Ch. D.	Chancery Division (Law Reports).
Challis, R. P.	Challis on Real Property.
Chitty, Prerog.	Chitty on the Prerogative of the Crown.
Cl. & F.	Clark & Finelly's Reports.
Co. Cop.	Coke's Complete Copyholder.
Co. Litt.	Coke upon Littleton (sometimes cited as First Institute). The references to the notes are to those by Hargrave and Butler.
Coll.	Collyer's Reports.
Com. Dig.	Comyn's Digest.

Cowp.	Cowper's Reports.
Cr. & J.	Crompton & Jervis's Reports.
Cr. & Ph.	Craig & Phillips' Reports.
Cro. El. / Cro. Jac / Cro. Car.	Croke's Reports in the time of Elizabeth, James I. an Charles I.
Cruise, Dig.	Cruise's Digest of the Law of Real Property.
Da. / Dav. / Dav. Prec. / Dav. Conv.	Davidson's Conveyancing Precedents.
Dav. Conc. Prec.	Davidson's Concise Precedents.
Dart, V. & P.	Dart's Law of Vendors and Purchasers.
Dea. & Ch.	Deacon & Chitty's Reports.
De G. F. & J.	De Gex, Fisher & Jones's Reports.
De G. J. & S.	De Gex, Jones & Smith's Reports.
De G. M. & G. / D. M. & G.	De Gex, Macnaghten & Gordon's Reports.
De G. & S.	De Gex & Smale's Reports.
Digby, R. P.	Digby's History of the Law of Real Property.
Dougl. / Doug.	Douglas's Reports.
Drew.	Drewry's Reports.
Dr. & Sm.	Drewry & Smale's Reports.
Dr. & War.	Drury & Warren's Reports.
Dy. / Dyer.	Dyer's Reports.
E. & B. / El. & Bl.	Ellis & Blackburn's Reports.
E. B. & E.	Ellis, Blackburn & Ellis's Reports.
E. & E.	Ellis & Ellis's Reports.
East	East's Reports.
Elph. Introd.	Elphinstone's Introduction to Conveyancing.
Elph. & Cl. Searches	Elphinstone & Clark on Searches.
Elph. N. & C. Interp.	Elphinstone, Norton & Clark on Interpretation of Deeds.
Eq.	Equity.
Eq. Ca. Ab.	Equity Cases Abridged.
Ex.	Exchequer Reports.
Fearne, C. R.	Fearne on Contingent Remainders.
Giff.	Giffard's Reports.
H. L.	House of Lords Reports.
H. & C.	Hurlstone & Coltman's Reports.
H. & N.	Hurlstone & Norman's Reports.
Hare	Hare's Reports.
Hayes & Jarman	Hayes & Jarman's Concise Forms of Wills.
Inst. / Instit.	Coke's Institutes.
J. (after a name)	Judge or Justice.
J. & H. / Jo. & H.	Johnson & Hemming's Reports.

J. & Lat. / Jo. & Lat.	Jones & Latouche's Reports.
Jac.	Jacob's Reports.
Jac. & W.	Jacob & Walker's Reports.
Jur.	Jurist (Reports).
K. & E.	Key & Elphinstone's Compendium of Precedents.
K. & J.	Kay & Johnson's Reports.
Keen	Keen's Reports.
L. C.	Leading Cases. (*See* Smith, Tud., W. & T.)
L. J. (after a name)	Lord Justice.
L. J.	Law Journal Reports.
L. J. N. S.	,, ,, New Series.
L. R.	Law Reports.
L. R. C. P.	,, ,, Common Pleas.
L. R. Ch.	,, ,, Chancery Appeals.
L. R. Eq.	,, ,, Equity.
L. R. Ex.	,, ,, Exchequer.
L. R. Q. B.	,, ,, Queen's Bench.
L. Q. R.	Law Quarterly Review.
L. T.	Law Times Reports.
Ld. Raym.	Lord Raymond's Reports.
Leon.	Leonard's Reports.
Lev.	Levinz's Reports.
Litt.	Littleton's Tenures.
M. R.	Master of the Rolls.
M. & G. / Man. & Gr.	Manning & Granger's Reports.
M. & S.	Maule & Selwyn's Reports.
M. & W.	Meeson & Welsby's Reports.
Madd.	Maddock's Reports.
Mer.	Merivale's Reports.
Mod.	Modern Reports.
Moo.	Sir F. Moore's Reports.
Moo. P. C.	Moore's Privy Council Reports.
My. & C	Mylne & Craig's Reports.
My. & K.	Mylne & Keen's Reports.
N. C.	New Cases.
N. R.	New Reports.
N. S.	New Series.
P. C.	Privy Council.
P. D.	Probate Division (in Law Reports).
P. W. / P. Wms.	Peere Williams' Reports.
Palm.	Palmer's Reports.
Perk. Prof. Bk.	Perkins's Profitable Book.
Ph.	Phillips' Reports.
Plowd.	Plowden's Reports.
Pre. Ch.	Precedents in Chancery.

Prest. Abst.	Preston on Abstracts of Title.
Pr. / Price.	Price's Reports.
Prid.	Prideaux's Conveyancing Precedents.
Q. B.	Queen's Bench Reports (Adolphus & Ellis, New Series.)
Q. B. D.	Queen's Bench Division (in Law Reports).
R. S. C.	Rules of the Supreme Court.
Rep.	Coke's Reports, Numbers refer to Parts, not to Volumes
Roll. Ab.	Rolle's Abridgment.
Russ.	Russell's Reports.
R. & M.	Russell & Mylne's Reports.
S. C.	Same Case.
S. J. / Sol. J.	Solicitor's Journal.
S. L. A.	Settled Land Act.
S. & S.	Simon & Stuart's Reports.
Salk.	Salkeld's Reports.
Sand. Us.	Sanders on Uses.
Sch. & Lef.	Schoales & Lefroy's Reports.
Shep. T.	Sheppard's Touchstone.
Sid.	Siderfin's Reports.
Sim.	Simon's Reports.
Sim. N. S.	,, ,, New Series.
Sim. & St.	Simon & Stuart's Reports.
Sm. & G.	Smale & Giffard's Reports.
Sm. L. C. / Smith, L. C.	Smith's Leading Cases in Common Law.
Smith, L. & T.	Smith's Landlord and Tenant.
Spence	Spence's Equitable Jurisdiction of the Court of Chancery
Stat.	Statute.
Str.	Strange's Reports.
Sugd. Pow.	Sugden on Powers.
Sugd. V. & P.	Sugden on Vendors and Purchasers.
Sw. / Swanst.	Swanston's Reports.
T. R.	Term Reports (by Durnford & East).
Taunt.	Taunton's Reports.
Theob.	Theobald on Wills.
Tud. L. C. R. P.	Tudor's Leading Cases on Real Property.
Tyr.	Tyrwhitt's Reports.
V. C.	Vice-Chancellor.
Ventr.	Ventris's Reports.
Vern.	Vernon's Reports.
Ves. Sen.	Vesey Senior's Reports.
Ves.	Vesey Junior's Reports.
Vin. Abr.	Viner's Abridgment.
W. & T.	White & Tudor's Leading Cases in Equity
W. Bl.	Sir W. Blackstone's Reports.

W. R.	Weekly Reporter.
Willes	Willes's Reports.
Wils.	Wilson's Reports.
Wms. Pers. P.	Williams on Personal Property.
Wms. R. P.	Williams on Real Property.
Wms. Exors.	Williams on the Law of Executors.
Wms. Saund.	Saunders' Reports by Williams.
Y. & C.	Younge & Collyer's Reports.

ADDENDA.

Page 141. Reference should also be made to the "Intestates Estates Act, 1890," 53 & 54 Vict. c. 29, which in effect gives to the widow of a man who dies intestate after the 1st September, 1890, "leaving a widow but no issue" a charge on his net real and personal property to the extent of £500.

THE MODERN LAW

OF

REAL PROPERTY.

CHAPTER I.

LAW—PROPERTY.

"Law of England."

THE subject of this book is the law of England relating to Real Property.

In the expression "the law of England," the word "law" is used as including the whole body of law in force in England; viz., (1) Common law; (2) Customary law; (3) The law Merchant, or custom of Merchants; (4) Statute law; (5) the Prerogatives of the Crown; (6) the Privileges of Parliament; (7) Equity; (8) parts of the Canon law.

"Law."

But the word "law" is frequently used by lawyers in contradistinction to "Equity," and when so used it denotes those branches of the law of England which, before the 1st November, 1875 (*a*), were administered by the Common Law Courts (*b*) at Westminster, that is to say, Common law, Customary law, and the law Merchant.

"Common law."

The term "Common law" is also used in contradistinction to customary law or Statute law. We distinguish, for example,

(*a*) The time appointed by the Supreme Court of Judicature (Commencement) Act, 1874 (37 & 38 Vict. c. 83), as the day on which the Supreme Court of Judicature Act, 1873 (36 & 37 Vict. c. 66) was to come into operation.

(*b*) The Courts of (King's or) Queen's Bench, the Court of Common Pleas (sometimes called the Common Bench), and the Court of Exchequer. While the Courts sat in Westminster Hall itself, the Court of Chancery was on one side of the Hall, and the Courts of King's Bench and Common Pleas on the other; hence the phrase "On the other side of Westminster Hall" when used by a common lawyer meant equity, and *vice versâ*.

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between descent according to common law and according to a custom, and between conveyances operating at common law and those operating under the Statute of Uses. It is perhaps impossible to give a strict definition of the term "Common law," as so used. It appears to consist of that branch of unwritten law which has been in force from time immemorial in theory at least all over England.

"Customary Law."

Customary law is law which has prevailed from time immemorial in certain places only. Examples are afforded by the law regulating dealings with copyholds, which varies according to the customs of the different manors of which the copyholds are holden.

"Law Merchant."

Law merchant is that part of the law regulating trade which is neither common nor statute law (*c*).

"Prerogative Privilege."

The Prerogatives of the Crown and the Privileges of Parliament are those special laws affecting the Crown and the Houses of Parliament respectively which are not statute law.

"Equity."

Equity is that branch of law which, before the 1st Nov. 1875, was administered exclusively by the Court of Chancery, and some other Courts having local jurisdiction in equity (*d*). It was entirely ignored by the Common law Courts.

"Canon Law."

Canon law, so far as it remains in force, regulates the clergy and questions as to marriages and legitimacy.

The whole of the English law, with the exception of statute and canon law, is unwritten; that is to say, it can only be ascertained from the decisions of the Courts; but some few old text books are considered as authorities (*e*).

Common Law.

Although common law has existed in theory from time immemorial, instances can be found where, as a matter of fact, it has been altered by judicial decision. In such cases the theory is that the law always existed in the form declared by the decision, and that any earlier and inconsistent decision was erroneous, so that it is impossible to prove that a rule is not good common law merely by shewing its origin within the time of legal memory.

Custom.

Where it is alleged that a custom exists, and that therefore the

(*c*) Co. Litt. 182*a*.

(*d*) By the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), a limited jurisdiction in equity was given to the Superior Courts of Common Law and to certain Courts having local jurisdiction.

(*e*) *E.g.*, Coke upon Littleton; Sheppard's Touchstone.

common law is excluded, proof of the alleged custom must be given (*f*). As a custom to be good must have existed before the commencement of legal memory (*g*), proof of its origin within that time shews that it is not a good custom.

Law Merchant

Lord Denman says (*h*):—

"The law merchant forms a branch of the law of England; and those customs which have been universally and notoriously prevalent amongst merchants, and have been found by experience to be of public use, have been adopted as part of it upon a principle of convenience and for the benefit of trade and commerce; and, when so adopted, it is unnecessary to plead and prove them. They are binding on all without proof.

"There may be some questions depending on customs amongst merchants, where, if there be a doubt about the custom, it may be fit and proper to take the opinion of merchants thereupon. Yet that is only where the law remains doubtful, and even there the custom must be proved by facts, not by opinion only, and it must also be subject to the control of law" (*i*).

Statutes.

Every person is supposed to know the contents of a public statute, which therefore requires no proof; but for greater certainty, a printed copy may be referred to. If there is any doubt as to the accuracy of the copy, it may be compared with the Parliament Roll (*k*).

Acts of Parliament which are not public, *i.e.*, local and personal or private Acts, can be proved by producing a copy purporting to be printed by the Queen's printer (*l*).

The method of proving those few Acts which are not printed by the Queen's printers (which is sometimes the case with respect to Acts of a strictly personal nature, as an Act for dissolving a marriage) is to produce an examined copy, *i.e.*, a copy proved by oral evidence to have been examined with the original and to correspond therewith.

Prerogative Privilege.

The prerogatives of the Crown (*m*) and the privileges of Par-

(*f*) As to the distinction between the customs of Gavelkind, Borough English, and other customs, see Co. Litt. 175 b; *Doe* v. *Scudamore*, 2 Ld. Raym. 1025; *Crosby* v. *Hetherington*, 4 Man. & Gr. 946; *Rider* v. *Wood*, 24 L. J. Ch. 737, 1 K. & Jo. 644.

(*g*) The first day of the reign of Richard the First (2nd Instit. 239), 3rd September, 1189.

(*h*) *Barnett* v. *Brandao*, 6 Man. & Gr. at 665.

(*i*) Per Wilmot, J., *Edie* v. *East India Co.*, 2 Burr. 1226.

(*k*) *Rex* v. *Jeffries*, Str. 446.

(*l*) The Documentary Evidence Act, 8 & 9 Vict. c. 113.

(*m*) *Rex* v. *Elderton*, 2 Lord Raymond, 980.

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liament (*n*) are taken judicial notice of. A distinction between prerogative and privilege appears to be that nothing is recognized as prerogative but that which can be proved by precedent to be so; but on the other hand it is very doubtful whether a court of law would at the present day deny that to be privilege which is claimed by either House of Parliament. In practice no conflict is likely to arise, as the House of Commons enforces its privileges by committing any person who violates them by warrant merely stating that he has "been guilty of contempt and breach of privilege," and the Courts will not inquire into the merits of such commitment (*o*).

Equity.

The rules of Equity can only be ascertained by reported decisions.

Canon Law.

Canon law is written law (*p*). Even before the Reformation and even on matters purely ecclesiastical, Common law differed in some cases from the Canon law, and in these cases Common law prevailed (*q*). It was provided by 22 Hen. 8, c. 19, s. 7, "That such canons constitutions ordinances and Synodals provincial being already made which be not contrariant or repugnant to the laws statutes and customs of this realm nor to the damage or hurt of the King's prerogative royal shall now still be used and executed as they were afore the making of this Act till such time as they be viewed searched or otherwise ordered and determined" by a commission to be appointed under the Act (which has never been done).

That part of the Canon law which is in force in England, together with some parts of the Statute law affecting the Clergy especially, is sometimes called the Ecclesiastical law (*r*).

Property.

"Property" is an ambiguous term; for it may denote either the things which are the objects of rights or ownership, or the rights over or ownership of such objects.

Thus, I make a will and leave to A. B. "all my property." It is plain that what I am dealing with is my whole actual wealth,

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(*n*) *Lake* v. *King*, 1 Wms. Saund. 131 a; *Stockdale* v. *Hansard*, 9 Ad. & El. 1, 11 Ad. & El. 253; *Cassidy* v. *Steuart*, 2 Man. & Gr. 437; the *Case of the Sheriff of Middlesex*, 11 Ad. & El. 273; *Sims* v. *Marryat*, 17 Q. B. 292.

(*o*) The *Case of the Sheriff of Middlesex*, 11 Ad. & El. 223.

(*p*) A list of the works containing Canon law will be found in 4 Law Quarterly Review, 358.

(*q*) See the cases collected 5 Law Quarterly Review, 46.

(*r*) *Mackonochie* v. *Penzance*, 6 App. Ca. 446. The Canons of 1603 bind the clergy but do not bind the laity. *Exeter* (*Bishop of*) v. *Marshall*, L. R. 3 H. L. 17.

my lands, houses, consols, shares, cash, debts owing to me, in fact everything belonging to me (*s*); and upon my death A. B. will succeed to all I am worth. The term "property" may thus represent the substance of things which can be appropriated by their possessor to his own use and enjoyment. But when the subject which is being dealt with is not the substance itself, but the interest of a person in it, the term "property" may denote merely the extent of that interest, or, in other words, the rights of that person in relation to the substance. Thus, in a piece of land there may be different proprietary interests: one person may be a tenant of it for a term of years; another may, subject to this term, have an interest in it for his life; and a third may have the absolute interest, subject only to the exhaustion of the two preceding interests, those, namely, of the tenant for the term and of the tenant for life. The interest of each person is his proprietorship or property (*t*) in the thing—something plainly different from the thing itself. It is with the regulation of the interest or proprietorship of persons in things that the Law of Property deals (*u*). By Blackstone and other text writers (*x*) this branch of the law is treated of under the head of Rights

(*s*) The aggregate of my faculties, rights or means; Austin's Jurisp. Stud. Ed. p. 385 (Lect. xlvii.).

(*t*) The old books commonly speak of the "propriety" or ownership of the soil. See, *e.g.*, Hale de Jure Maris, reprinted in 1 Hargrave's Law Tracts. As to the meaning of the Latin word "*proprietas*" see Spelman Gloss. s. v.

(*u*) *I.e.*, it deals with "Property" in the sense of the rights of persons over things as distinguished from "Property" in the sense of the things which are the subjects of those rights. As to the different meanings of the word "Property," see Wms. R. P. (16th ed.) p. 14, n. (*g*); Austin's Jurisp. (4th ed.) Lect. xiv. p. 382; Lect. xlvii. pp. 817—820 (Stud. Ed. pp. 177, 383—385). Austin observes that in English law the term "property," in the sense of ownership, is applied to moveables only, the term "Estate" being used when the subject-matter is immoveable, *i.e.*, land. (An instance of the ambiguous use of the word "property" will be found in s. 55 of the Bankruptcy Act, 1883; see the remarks of Lindley, L.J., in *In re Finley*, 21 Q. B. D. 475, at p. 484). The reader is referred to the Appendix (p. 255) to Part I. of Mr. Digby's "History of the Law of Real Property," for a discussion of "The place of the Law of Real Property in the English System." See as to the difference between "property" and a mere *spes successionis*, *Re Parsons, Stockley* v. *Parsons*, 45 Ch. D. 51, where Kay, J., cites the judgment of Lord Eldon in *Dursley* v. *Fitzhardinge*, 6 Ves. 251, 260, drawing a distinction between an "expectation" (*spes successionis*) and an "expectancy," in the legal sense.

(*x*) See 1 Bl. Comm. 122; and the criticism of Austin (Lect. xl.) who says: "The Law of Persons is that part of the law which relates to *status* or conditions. The Law of Things, like the Law of Persons, relates to rights and duties, but to rights and duties considered generally and in the abstract, exclusively of the rights and duties which are the con-

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of Property or Rights of Things,—"those rights which a man may acquire in and to such external things as are unconnected with his person"; as opposed to the Rights of Persons or "such rights and duties as are annexed to the persons of men" (*y*).

Movable and immovable

Things—the objects of rights or interests—have been differently classified. In the early ages of Europe property was chiefly of a substantial and visible, *i.e.* a corporeal, kind: under the Roman Law things corporeal were divided into movable and immovable (*z*). In England a different classification prevailed, namely, into "lands, tenements, and hereditaments" on the one hand, and "goods and chattels" on the other—terms still in use, to which we shall presently advert. In modern times, property generally has been classified into "real and personal." Both these classifications—"movable and immovable" and "real and personal"—suggest a distinction between that species of property which is of a fixed and permanent character, as land, and that which is of a more shifting and transient nature, capable of being passed from hand to hand, as for instance, money. But the former classification, namely "movable and immovable," which is the more natural, alone corresponds with an essential difference in the subject matter (*a*). The latter classification, namely "real and personal," in fact owes its origin to the technical names given to the remedies formerly afforded by the English law to persons deprived of their property. Where the possession of land was wrongfully withheld from its rightful owner, the remedy was an action for the thing itself, termed a real action (*actio in rem*) (*b*), because the *res* or land itself would be recovered; whilst, in the case of a wrongful withholding or deprivation of goods, the remedy was an action (*actio in personam*) (*c*), in

Lands, tenements, and hereditaments.

Goods and chattels.

Real and personal.

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tituent elements of conditions or *status*. . . . Much, therefore, of the Law of Persons relates to things, properly so called, while much of the Law of Things does not. . . . The Law of Things is the *corpus juris*, minus the law of *status* or conditions. The Law of Persons is the law of *status* or conditions, detached for convenience from the body of the entire legal system."

(*y*) 2 Bl. Comm. 1. Austin in several places remarks upon the absurdity of translating "*Jus Rerum*," "*Jus Personarum*," as "Rights" of Things and of Persons.

(*z*) Institutes of Justinian, by Sandars, p. 38. See *post*, p. 23. Sir H. Maine (Early Law and Custom, ch. x.) observes that this classification is, in the Roman Law, comparatively modern.

(*a*) Maine's Ancient Law, 273.

(*b*) Co. Litt. 285 *a*. See Wms. R. P. 7, n. (*d*); and Digby, R. P. p. 69. As to the meaning of "action," see 2nd Instit. 40, *Edward Altham's Case*, 8 Rep. 105b.

(*c*) See Wms. P. P. pp. 3, 4, as to Real actions and Personal actions. If

which only a personal duty could be enforced, viz., payment of damages.

Real actions.

Real actions, the forms of which were various and complicated (*d*), were, with the exception of four, namely the writ of right of dower, writ of dower *unde nihil habet*, *quare impedit*, and ejectment, abolished in 1833 by 3 & 4 Wm. IV. c. 27, s. 36 (*e*); those which remained, of which the most important was the action of ejectment, were completely remodelled by the Common Law Procedure Act, 1860 (*f*). Ejectment (*ejectio firmæ*) had been, until the end of the 15th century, a personal action by a tenant for term of years claiming damages for ouster from the land demised; it being then resolved by the judges that the land also might be recovered, ejectment became the ordinary mode of enforcing a right of entry (*g*). It was brought ostensibly rather to recover possession of the land than to assert a title to it which should be altogether indefeasible. For, the law considering the person in possession as owner until the contrary is proved (*h*), the plaintiff recovered by the strength of his own and not by the weakness of the defendant's title; should he succeed, he in turn

Action of ejectment.

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the plaintiff recovered in a real action, a writ was directed to the sheriff of the county commanding him to give the plaintiff seisin, *i.e.*, possession, of the land so recovered. In personal actions the judgment was that something be done or rendered by the defendant; and in order to compel him so to do and to see the judgment executed, a special writ of execution issued to the sheriff according to the nature of the case. But even in an action for the specific recovery of personal chattels unjustly detained, the wrong-doer could not be compelled to a restitution of the identical thing taken or detained; he had his election to deliver the goods or their value; "an imperfection in the law," Blackstone remarks, "that results from the nature of personal property, which is easily concealed or conveyed out of the reach of justice; and not, like land and other real property, always amenable to the magistrate." (3 Bl. 413.) This imperfection, however, was partially removed by the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), s. 78, which deprived the defendant, where the chattel was forthcoming, of the option of giving it up or paying the value whenever the plaintiff deemed money to be an inadequate compensation for the loss to him of the chattel. This section, having been embodied in R. S. C. Order XLVIII., was repealed by 46 & 47 Vict. c. 49.

(*d*) See Smith's Action at Law, ch. 3 Booth on Real Actions.

(*e*) They are there enumerated, and see 3 Bl. c. 10, for an account of them.

(*f*) 23 & 24 Vict. c. 126.

(*g*) Smith's Action at Law, ch. 13; Digby, Hist. R. P. 3rd ed. pp. 143, *et seq.* The nature and course of the proceedings are exhibited in the Appendix No. II. to Bl. Comm. vol. iii. See also the pleadings in *Pelham's Case*, 1 Rep. 3*a*.

(*h*) That possession is *primâ facie* evidence of seisin in fee simple, see *Lyell* v. *Kennedy*, 8 App. Cas. at p. 232; Best on Evidence (7th ed.), p. 340, § 366; Williams on Seisin, p. 7, cited by James, L.J., in *Leach* v. *Jay*, 9 Ch. D. at p. 44. Cf. R. S. C. Ord. XXI. r. 21.

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might be ejected by another showing a still better title (*i*). Now under the Judicature Act there is no special action of ejectment, and in the High Court an action for the recovery of land proceeds, with a few exceptions, in like manner to any other action. The County Courts, under the County Courts Act, 1888, have jurisdiction in ejectment where neither the value nor the rent exceeds £50 per annum (*k*).

Personal Property.

As to Personal Property Blackstone says (*l*):—

"Things personal are goods, money, and all other movables which may attend the owner's person wherever he thinks proper to go."

As will appear from what has already been said, this is not a correct definition, and, as a fact, goods and chattels were not usually called things personal till they had become too numerous and important to attend the persons of their owners. As Sir H. Maine has observed (*m*):—

"The lawyers of all systems have spared no pains in striving to refer these classifications to some intelligible principle, but the reasons of the severance must ever be vainly sought for in the philosophy of law: they belong not to its philosophy, but to its history."

The same learned writer observes (*n*):—

"In all the countries governed by systems based on the French codes, that is, through much the greatest part of the continent of Europe, the law of movables, which was always Roman Law, has superseded and annulled the feudal law of land. England is the only country of importance in which this transmutation, though it has gone some way, is not nearly accomplished."

Lands, tenements, and hereditaments.

Although the classification of property into "real and personal" is the prevailing one in modern English law, in the earlier period of its history what is now usually referred to as real property was comprehended under the three general heads, Lands, Tenements, and Hereditaments; what is now spoken of as personalty being distinguished by the term Goods and Chattels. These terms are still recognized, and are commonly used in deeds; it is therefore necessary to understand what is meant by and comprised in them.

Land.

"Land" to a certain extent explains itself. All know what, in a popular sense, is meant by the expression. But this does not

(*i*) Broom's Commentaries, 836.
(*k*) 51 & 52 Vict. c. 43, s. 59.
(*l*) Vol. ii. p. 16.
(*m*) Maine, Ancient Law, c. 8, p. 274.
(*n*) *Ib.* 283.

accurately define its legal meaning, which is, not only everything constituting the external substance of the earth, that is, its mere surface soil, but all above and below it. Thus, a structure on the land, as a house (*o*), or trees growing out of it, are included under the term "land," and so is everything lying beneath its surface, as ores, fossils (*p*), mines, &c. And, as water must flow over land, a gift of land will carry the water which covers it, though in terms water be not expressed. On the other hand, suppose the gift to be of the water instead of the land over which it flows, that land will not pass, but a right of fishery only (*q*). There is no property in water; for, says Blackstone (*r*):—

"Water is a movable wandering thing, and must of necessity continue common by the law of nature, so that I can only have a temporary transient usufructuary property therein; wherefore if a body of water runs out of my pond into another man's, I have no right to reclaim it, but the land which that water covers is permanent, fixed, and immovable, and, therefore, in this I may have a certain substantial property, of which the law will take notice and not of the other" (*s*).

Again, of a gift of land he says:—

"If a man grants all his lands he grants thereby all his mines of metal and other fossils, his woods, his waters, and his houses, as well as his fields and meadows."

The same thing is thus expressed in the Touchstone:—

"By the grant of the land or ground itself all that is *supra*, as, houses, trees, and the like, is granted, for '*cujus est solum, ejus est usque ad cœlum;*' and also all that is *infra*, as mines, earth, clay, quarries, and the like" (*t*).

But this extensive signification of the word "land" may be controlled by the context, as, where land is spoken of in plain contra-

(*o*) *Allaway* v. *Wagstaff*, 4 H. & N. 307.

(*p*) *E.g.*, coprolites; *A.-G.* v. *Tomline*, 5 Ch. D. 750. See also *Elwes* v. *Brigg Gas Co.*, 33 Ch. D. 562, in which the question was discussed (but not decided) whether a prehistoric boat embedded in the soil was in point of law to be considered as a mineral or as part of the soil or as a chattel.

(*q*) 4 Cruise, Dig. p. 268; *contra*, of a gift of a pool; Co. Litt. 5*a*.

(*r*) Vol. ii. p. 18.

(*s*) See also Co. Litt. 4*a* and 4*b*.

(*t*) Sheppard's Touchstone, 90. Sheppard's Touchstone is now admitted to have been the work of Mr. Justice Doderidge. Sheppard is said to have purchased the judge's library after his death in 1628, and this manuscript of the Touchstone was found in it. (See Preston's Edition,—his address to the reader, and Hilliard's address.) The same judge is also supposed to have been the author of Wentworth's Office of an Executor. (Wms. Pers. P., p. 28, n.; Wms. on Executors, i. 710, n.)

Messuage. A dwelling-house with its adjacent buildings and curtilage appropriated to the use of the household; a manor house.

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distinction to houses, it will not be taken to comprise them; so mines lying under a piece of land may be excepted out of a conveyance of such land. On the other hand, under a gift or grant of a "house," or, of a "messuage," land commonly occupied with it will not pass unless immediately annexed to and enjoyed with the house, as out-buildings, orchard, garden, and curtilage (or courtyard) (*u*).

A railway company, purchasing land under the Railways Clauses Consolidation Act, 1845 (*x*), are not entitled to the minerals unless expressly purchased, and minerals are deemed to be excepted out of the conveyance unless expressly named and conveyed.

"Land" in Statute.

In various Acts of Parliament the word "land" has special meanings assigned to it, but only in each case for the purposes of the particular Act. Thus, in the Conveyancing and Law of Property Act, 1881 (*y*), "land," unless a contrary intention appears, includes land of any tenure, and tenements and hereditaments, corporeal or incorporeal, and houses and other buildings. A general enactment is contained in the Interpretation Act, 1889 (*z*), which provides that, in every Act passed after the year 1850, the expression "land" shall, unless the contrary intention appears, include messuages, tenements, and hereditaments, houses and buildings, of any tenure.

Tenement.

The word "tenement" in its strict legal signification, is something which may be holden, that is, be the subject of tenure, but popularly it is often applied to designate houses or other buildings. Thus a house is commonly described in a deed as "all that messuage or tenement" (*a*): and in Acts of Parliament the word "tenement" is sometimes used to mean a house (*b*). It

(*u*) Shep. T. 94; Co. Litt. 5*b*, 56*b*; Cruise, Dig. vol. iv. p. 267; and see the authorities cited in Elph. N. & C. Interp. p. 588 (s. v. *House*) and p. 602 (s. v. *Messuage*). See further, as to the meaning of the word "land," Co. Litt. 4*a*, 19*b*, and authorities cited in Elph. N. & C. Interp. Glossary, p. 590, s. v.; Challis, R. P. 36. In the year books and old records "*terra*" is regularly used to denote arable land only, as distinguished from meadow, pasture, &c.; see 4 Cruise, Dig. 267; Shep. T. 13; *b*. 92; Wms. R. P., Appx. C., p. 588. In *Silly* v. *Silly*, 1 Ventr. 260, it is said that, in pleading, "land" signifies arable only, but that in a grant it may extend to meadow, pasture, &c.; and so in *Skinner* v. *Newton*, 10 Mod. 170; *Jackson* v. *Laveright*, *ib*. 186.

(*x*) 8 & 9 Vict. c. 20, s. 77. See, as to what minerals are within the section, *Midland Ry. Co.* v. *Robinson*, 15 App. Cas. 19, and cases there cited.

(*y*) 44 & 45 Vict. c. 41, s. 2 (ii.).

(*z*) 52 & 53 Vict. c. 63, s. 3, replacing a similar provision in s. 4 of the repealed Act 13 & 14 Vict. c. 21. See 34 Sol. Journ. 688

(*a*) See 2 Davidson's Preced. Conv ii. 237.

(*b*) See instances in *Yorkshire Fire*

includes not only the land itself, but certain interests arising out of it (*c*); for example, a rent issuing, as it is technically termed, out of the land, payable by the holder of the land to another; a right of common of pasture, that is, to turn out cattle to pasture on the land of another; a right of turbary, that is, to cut turf fit for burning on another's soil (*d*).

Hereditament

The word hereditament "is the largest word of all in that kind," says Lord Coke, "for whatsoever may be inherited is a hereditament, be it corporeal or incorporeal, real or personal, or mixed" (*e*).

Chattels annexed to land.

Among hereditaments the English law recognizes some chattels which are considered, either by the common law or by special local custom, as annexed to the inheritance and descendible to the heir. Chattels of this nature cannot be separated from the inheritance by will (*f*), though the owner may during his lifetime sell or dispose of them. Thus at common law, deer in a lawful park (*g*) unless they have been reclaimed (*h*), fish in a pond, rabbits in a warren, doves in a dovecot, muniments of title of an estate of inheritance (*i*) and the chest or box containing them (*k*), pass to the heir with the land.

Heirlooms.

Where the enjoyment of chattels is annexed to a mansion or land by special local custom so as to devolve with the inheritance, such chattels are called "heirlooms" (*l*). The term "heirloom"

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and Life Insurance Co. v. *Clayton*, 8 Q. B. D. 421; *Dashwood* v. *Ayles*, 16 Q. B. D. 295.

(*c*) The question whether leaseholds for years are tenements is discussed in the Law Quarterly Rev., vol. v. p. 326, and vol. vi. p. 69.

(*d*) Co. Litt. 6*a*, 19*b*; Challis, R. P. 37; Elph. N. & C. Interp. 621.

(*e*) Co. Litt. 6*a*. It has been observed that "the word *hereditament*, when used in relation to land, sometimes denotes the land itself as a physical object, and sometimes the estate in the land." (Challis, R. P. 38). In *Tomkins* v. *Jones*, 22 Q. B. D. 599, it was said by Bowen, L.J., that in s. 56 of the County Courts Act, 1888, "it is not used as describing the quantum of interest in the subject-matter, but as describing the subject-matter itself, namely, the land;" and that therefore in that section it includes leaseholds. It is so used in the common phrase, "leasehold hereditaments."

(*f*) Co. Litt. 185*b*.

(*g*) *The Case of Swans*, 7 Rep. at 17*b*. As to the meaning of "Park" see Elph. N. & C. Interp. 606, s. v. "Park."

(*h*) *Morgan* v. *Abergavenny*, 8 C. B. 768; *Ford* v. *Tynte*, 2 Jo. & H. 150.

(*i*) See the cases collected 33 Sol. J. 655.

(*k*) Godolphin, pt. 2, c. 14, s. 1; Wentworth Off. Ex. 14th Ed. 156. It has been said that the executor shall have the chest unless it is sealed [locked ?]. *The Case of Mines*, Plowd. at 323*a*. Shep. Touch. 470, and the authorities there cited. Vin. Ab. Executors U. 7.

(*l*) Co. Litt. 18*b*. As to heirlooms see 1 Cruise, Dig. 46, ss. 5, 6. The meaning of "loom" appears to be furniture; see Skeat, Etym. Dict., s. v.; and this

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So also titles of nobility devolving on the heir are hereditaments (*s*).

Under one or other of the three terms of Lands, Tenements, and Hereditaments was included every species of real property, and the phrase is still in use to express that every kind of real property is intended.

Goods and chattels.

"Goods and chattels" (*t*) at the period when these terms were introduced into English Law were intended to embrace all property not comprised under one or other of the terms Lands, Tenements, and Hereditaments; and they are used in that sense to the present day as equivalent to Personalty.

The precise origin of the term "chattel" is left in some obscurity. Lord Coke says (*u*), "'Goods,' *biens, bona,* includes all chattels, as well real or personal. 'Chattels' is a French word, and signifies goods which by a word of art we call *catalla*" (*x*).

Blackstone (*y*) says that in the Grand Coustumier (*z*) of Normandy the word "chattels" is used, and set in opposition to a fief or feud; so that, not only goods, but whatever was not a feud, were accounted chattels. It may be sufficient to state that formerly (with one exception, that of a chattel real, to which we shall presently advert) the word was intended to designate everything movable with the person of its owner: for instance, animals, household-stuff, money, jewels, corn, garments, and everything else that can be properly put in motion and transferred from place to place (*a*); but in later times it came to be applied to such things as debts which might be owing to a person, his stock in the public funds, shares in companies, patents, and copyrights. These, like incorporeal hereditaments (which, however, existed from the earliest times), are in the nature of incorporeal chattels. They have been styled Choses in Action, while corporeal chattels, by way of distinction, have been termed

Choses in action.

(*s*) See *Re Rivett-Carnac*, 30 Ch. D. 136, where it was held that a dignity or title of honour (including a baronetcy), whether it be granted of a place or not, is an incorporeal hereditament. See also Challis, R. P. 39, 40.

(*t*) As to what passes by "goods and chattels," in a grant, see Shep. Touch. 97, 98, and in a will, *Kendall* v. *Kendall*, 4 Rep. at 370.

(*u*) Co. Litt. 118*b*.

(*x*) Chaucer, in his description of the Poure Wydow in the Canterbury Tales (The Nonne Prestes Tale), says—

"Syn thilke day that ache was last a wif,
In pacience ladde a ful symple lyf,
For litel was hire *catel* and hire rente.

(*y*) 2 Bl. 385.

(*z*) *I.e.*, "customary," which contains an account of local customs of tenure.

(*a*) 2 Bl. 387.

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Choses in possession.

Choses in Possession. Choses in Action were so styled because they were things of which a man had not the possession or actual enjoyment, but only a right to demand it by action or other proceeding. At first they could not be assigned, for it was considered that the transfer of a law suit would improperly multiply litigation (*b*); and until the Judicature Act, 1873, except in the case of negotiable instruments, and some other contracts made assignable at law by various statutes (*c*), the assignee's right was not complete at law unless the debtor assented to the transfer, and in the absence of such assent, an equitable title only passed to the assignee, and any action must have been brought in the original creditor's name: but by s. 25 (6) of that Act (*d*), any absolute assignment by writing signed by the assignor, of any "debt or other legal chose in action," with express notice in writing to the debtor, trustee, or other person from whom the assignor would have been entitled to receive or claim such debt or chose in action, is effectual at law to pass and transfer the legal right and all legal remedies (*e*).

Chattels real.

At the time when these earlier designations of the different kinds of property were introduced, and for long after, such was the condition of society that rights and interests in land chiefly attracted the consideration of the law (*f*). Even where land

(*b*) For a like reason it was held that the benefit of a condition (see *ante*, p. 13) can only be reserved to the donor, feoffor, or lessor, and their heirs; and not to a stranger. See 2 Cruise, Dig. p. 4, § 15; p. 33, § 46. The reason given in the text is that given by Coke, *Lampet's Case*, 10 Rep. at 48*a*. But it is suggested with great probability by Professor Maitland, in a most instructive article, 2 Law Quarterly Review, 481, that the real reason is that as the creditor had not possession, he was unable to deliver possession, and therefore to transfer the ownership, which formerly could not be transferred without the possession.

(*c*) Bills of Exchange, promissory notes, bills of lading, life and sea policies of insurance; Wms. Pers. P., pp. 11, 12. See as to assignments of policies of life assurance, 51 Vict. c. 8, s. 19, which makes the stamp essential to the validity of an assignment.

(*d*) 36 & 37 Vict. c. 66. See *Read* v. *Brown*, 22 Q. B. D. 128.

(*e*) See more about choses in action in Goodeve, Pers. P.; Elph. Introd. 170.

(*f*) The statement in the text has often been made, but it does not appear to be correct. Food and clothing are primary necessaries. In all archaic systems of law, we find that larceny, and in some cases distress, occupy an important place. Both these branches of law relate to personalty only. The late Sir H. Maine says:—"There must have been a time, when a wild animal tamed, which was a rarity, was of more value than a hundred acres of land, which was superabundant. The domain of a tribe, as soon as the history of mankind began, may have been jealously guarded as an exclusive hunting ground, as marking limits which none but a tribesman could step within, save for bloodshed or plunder, or may have been reserved by it, in a later stage of society, for pasture; but each man's

Chap. I.

itself was let out to lease, the interest acquired by the tenant was treated as a chattel only, though complimented with the title of a Chattel Real. At first, probably, the interest thus acquired, namely, the term granted, would be but of short duration, and therefore of no great consideration. Leases appear originally to have been merely for agricultural purposes (*g*). The lease was considered, not as a conveyance of any estate in the land, but only as a contract or covenant for the enjoyment of the rents and profits; to use the language of the civil law, a lease for years conferred only a right *in personam* and not a right *in rem;* and the only remedy for the lessee, if ejected, was by writ of covenant against the lessor to recover the term, if in being, and damages, in case the ouster was committed by the lessor himself, or, if the term had expired or the ouster had been committed by a stranger, then to recover damages only (*h*). A practice, however, grew up later of granting leases for very long periods, in duration almost equivalent to the ownership of the land itself, sometimes for 100 years or even 1000 years, and this is in modern English practice (*i*) a very common way of creating a charge upon land, the term in the land being granted as a security for the charge. Yet, notwithstanding the length of the term and the practical importance of its ownership, it has always retained the character of a chattel only, and like other personalty on the death of the termor, or lessee, vests in his personal representatives, and does not descend to his heir (*k*).

Leases.

share of this domain was of less value to him individually than a slave, a horse, an ox, or even than a flint headed axe or spear. All this follows from the simplest economic maxims; but the vestiges of the older, and yet probably not the oldest, state of the primitive objects of enjoyment are plainly stamped upon the authentic record of archaic custom, the ancient Irish law; and they seem to me equally discernible in the ancient Teutonic code, the Lex Salica, which whatever else it is, is preeminently a body of rules protecting the ownership of kine, swine, sheep, goats, horses, and even bees." Early Law and Custom, p. 338.

(*g*) Blackstone says "Farm or *feorme* is an old Saxon word signifying provisions (Spelm. Gloss. 229): and it came to be used instead of rent or render, because anciently the greater part of rents were reserved in provisions: in corn, in poultry and the like: till the use of money became more frequent. So that a farmer, *firmarius*, was one who held his lands upon payment of a rent or feorme: though at present by a gradual departure from the original sense the word "farm" is brought to signify the very estate or lands so held upon farm or rent" (2 Bl. 318). "Farm" is sometimes used in the sense of the thing demised, *Wrotesley* v. *Adams*, Plowd. at 194*a*, sometimes in the sense of the rent reserved, *Browning* v. *Berton*, Plowd. at 132*a*.

(*h*) 3 Bl. 156.

(*i*) In wills and settlements. For instance, see 4 Dav. Conv. 472.

(*k*) As to the history of chattel interests

Chap. I.

Trees.

Although the main division of property in English law is into Real and Personal, there are some few subjects of property of such a mixed character, that it depends on the circumstances of the case to which general classification they are to be ascribed. Thus, trees while standing on the ground are considered to partake of the nature of the soil itself, and are part of the realty. This flows out of the principle already explained, that whatever is attached to the soil acquires the character of the soil itself, as though it were part of it. But suppose the trees cut or blown down and thus severed from the land, they immediately become part of the personal property of the owner of the first estate of inheritance in fee or in tail (*l*).

Emblements.

Growing crops or 'emblements' (*emblavances de bled, i.e.*, springing corn)—*fructus industriales*—unlike trees and other permanent growths (*m*), devolve on the personal representative and not on the heir of the owner of the inheritance; the reason being, that, as annual crops are mainly the result of labour incurred at the expense of the owner's personal estate, the personal estate ought to reap the benefit and have the crop. But though the personal representative will take them as against the heir, a devisee of the land will take them against the personal representative, unless it appear with certainty that the testator intended some one else to take them (*n*).

And further, in favour of agriculture, it has been established that where a tenant has a limited interest in the soil, not for a fixed term but of uncertain duration, *e.g.*, for his own life, or during the life of another, he is or his personal representatives are entitled to the crops sown during his tenancy and reaped after its cesser or determination (*o*). As laid down by

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in land, see Digby, Hist. R. P., pp. 49, 143 *et seq.*, 197 *et seq.*, and J. W. Smith on Landlord and Tenant, Lect. I.; 1 Cruise, Dig. Tit. 8, ch. i. p. 222; Wms. R. P. pp. 10 *et seq.*; Bacon's Abridgm. tit. *Leases;* Challis, R. P. 46. But that learned author's remarks as to seisin appear to require some re-consideration in view of recent investigations; see the articles by Prof. Maitland (Law Quarterly Review, Vols. 1 and 2).

(*l*) See 1 Cruise, Dig. 126, 127; *In re Ainslie*, 30 Ch. Div. 485.

(*m*) *e.g.*, grass, though ready to cut for hay.

(*n*) *Cooper* v. *Woolfitt*, 2 H. & N. 126. "For the devisee is not *hæres factus*, but takes by conveyance. He is therefore entitled to everything which is appurtenant to the land." (*Per* Pollock, C.B.) He is a "purchaser" in law; see *post*, p. 126.

(*o*) "And this is not only proper to a lessee at will . . . but to every particular tenant that hath an estate incertain," Co. Litt. 55*b*. See 1 Cruise, Dig. 105, 106. "But," says Littleton, s. 68 (Co. Litt. 55*a*), "otherwise it is if tenant for years, which knoweth the end of his term, doth sow the land, and his term

Denman, C.J., (*p*), the principle is that the tenant should be encouraged to cultivate, by being sure of receiving the fruits of his labour. The tenant is entitled to that species of product only which grows by the industry and manurance (*q*) of man, and to one crop only of that product. And he is entitled to a crop of that species only which ordinarily repays the labour by which it is produced within the year in which that labour is bestowed, though the crop may in extraordinary seasons be delayed beyond that period, *e.g.*, clover.

Mr. Leake (*r*) says:—

"The term '*emblements*' is used to designate the growing crops cultivated by the labour and at the cost of the tenant in possession, which are treated in law for many purposes as moveable chattels, and as the personal property of the tenant, because his intention in cultivating them is to increase his personal estate rather than to benefit the heir or successor to the land. The class of things thus designated includes the annual crops of corn and grain, hemp and flax, hops, potatoes, turnips and the like, clover and artificial grasses; but not growing grass, which is the natural and permanent produce of the land renewed from time to time without cultivation (*s*). It does not include timber or other trees, whether mature or immature; nor does it include the growing fruit of trees, as growing crops of apples and pears (*t*). The term, as used in law, conveys only the present annual crop, and not the future crops of cultivated products which bear annual crops for several successive years, as of clover and artificial grasses" (*u*).

Where the lease ceases by the death or cesser of the estate of any landlord entitled for his life, or for any other uncertain interest, a statute of the present reign (*x*) recompenses the tenant at rack-rent, not by the emblements, but by a permission to hold until the expiration of the current year of his tenancy.

Trees when severed from the ground, and the fruit and produce of them when severed from the body of the tree, and emblements, are sometimes called "chattels vegetable" (*y*).

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endeth before the corn is ripe." But by local custom or by express contract tenants for years may be entitled to similar rights under the name of "away-going crops;" see *Wigglesworth* v. *Dallison*, Dougl. 201, and notes to that case in 1 Smith L. C.; see also J. W. Smith's Law of Landlord and Tenant, Lect. ix. p. 393 (3rd ed.), as to emblements and way-going crops.

(*p*) In *Graves* v. *Weld*, 5 B. & Ad. 117.

(*q*) As to the meaning of this word, see Elph. N. & C. Interp. 57, note.

(*r*) Law of Uses and Profits of Land, p. 44.

(*s*) Co. Litt. 55*b*; Wms. Exors. 597; *Evans* v. *Roberts*, 5 B. & C. 832.

(*t*) *Ib.*, and see *Rodwell* v. *Phillips*, 9 M. & W. 505.

(*u*) *Graves* v. *Weld*, 5 B. & Ad. 119.

(*x*) 14 & 15 Vict. c. 25, s. 1. See also 53 & 54 Vict. c. 57.

(*y*) 1 Wms. on Exors., pt. ii. bk. ii. ch. ii. s. 2.

By the ancient rule of the common law, expressed in the maxim *quicquid plantatur solo, solo cedit*, whatever is planted or built in the soil or freehold becomes part and parcel of it. Thus, as we have seen, a house becomes parcel of the land on which it stands. In like manner whatever was annexed or affixed to the soil, or to any building which stood upon it (and was not merely laid upon or brought into contact with it) was treated as an addition to the property of the owner of the soil, and was termed a "fixture." But the old rule has in later times, upon motives of public policy, to encourage improvements (*z*), and to encourage trade (*a*), been greatly relaxed both as between lessor and lessee, and in favour of the personal representatives of a tenant for life as against the person next entitled to the estate. The tenant for a term of years may now remove articles set up by him for the purpose of trade, or for the purpose of ornament or domestic convenience, as marble chimney-pieces, pier-glasses, hangings, wainscot fixed only by screws, and the like (*b*), provided (in the absence of express power given to enter and remove after the expiration of the lease) they are removed during the term (*c*); and the same articles may be removed by the tenant for life or by his personal representatives, if put up by himself; but, if erected by the owner of an estate of inheritance, they will pass with the house to the devisee or heir. There is a stricter limitation of the tenant's right to remove what are styled ornamental fixtures than to his right to remove trade fixtures. The general rule as to the former seems to be, that they must not be removed if permanent injury to the building would be caused by the removal; but as to the latter, the right to remove them is generally bounded by the rule only, that the principal thing "shall not be destroyed by the accessory" (*d*). The question

(*z*) *Per* Ld. Hardwicke, *Lawton* v. *Lawton*, 3 Atk. 15.

(*a*) *Elwes* v. *Maw*, 2 Sm. L. Cas. 182; *per* Ld. Ellenborough.

(*b*) *Elwes* v. *Maw*, 2 Sm. L. Ca.

(*c*) *Pugh* v. *Arton*, L. R. 8 Eq. 626. See as to fixtures where the lessee is bankrupt, Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 55, § 3; *In re Moser*, 13 Q. B. D. 738.

(*d*) As to trade fixtures, see *Lawton* v. *Lawton*, 3 Atk. 13; a fire-engine set up for the benefit of a colliery by a tenant for life was held to be part of his personal estate. As to ornamental fixtures, see *Buckland* v. *Butterfield*, 2 Brod. & B. 54, where a conservatory erected by a tenant for years and attached to the dwelling-house, was held to have become part of the land, and not removable. See generally as to fixtures, J. W. Smith, Landl. and Tenant, Lect. ix. pp. 420 *et seq.* (3rd ed.).

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often arises in cases of distress for rent by a landlord, the rule being that he cannot distrain fixtures annexed to the freehold (*e*); and so it has been held that railways by their annexation to the soil become fixtures, and are not distrainable (*f*). It has been said by a learned writer that "the doctrine of fixtures rests on a series of judicial decisions in contravention of an ancient rule in favour of the freehold," and the word "fixtures" has come to be used in a sense directly the reverse of its natural and original signification. In 1834, Parke, B. (*g*) said:—

"The term 'fixtures' has now acquired the peculiar meaning of personal chattels which have been annexed to the freehold, but which are removable at the will of the person who has annexed them."

As regards buildings used for purposes of agriculture, as distinguished from trade, the old rule prevails, namely, that all those erections whose foundations are let into the ground become part of the realty and belong to the landlord (*h*). But from this must be excepted cases falling within 14 & 15 Vict. c. 25, s. 3, which made buildings, engines, or machinery, erected (either for agricultural purposes or for the purposes of trade and agriculture) by the tenant with the consent in writing of the landlord, removable by the tenant, unless the landlord after notice should elect to purchase them; or within the Agricultural Holdings Act, 1875 (*i*), which contained similar provisions, and did not require the fixtures to have been erected with the consent of the landlord; or (from the 1st January, 1884) within the Agricultural Holdings Act, 1883, which applies also to any fencing or building (*j*).

Animals.

Another subject of property which should be here referred to is animals. They have been classified into such as are tame or domesticated, and seldom if ever found wandering at large, and such as are wild or usually found at liberty—*domitæ naturæ* and

(*e*) See *Simpson* v. *Hartopp* in 1 Sm. L. C., and notes thereto; J. W. Smith, L. and T. 213.

(*f*) *Turner* v. *Cameron*, L. R. 5 Q. B. 306; and see *Dumergue* v. *Rumsey*, 2 H. & C. 777, where a tenant holding under a lease had renounced the ordinary right of a tenant to disannex fixtures during the term, and therefore they could not be taken in execution by the sheriff.

(*g*) *Hallen* v. *Runder*, 1 C. M & R. 276.

(*h*) *Elwes* v. *Mawe*, 2 Sm. L. C. 182. The subject of Fixtures is treated at length in Wms. on Exors., vol. i. pt. ii. bk. ii. c. 2, s. 3.

(*i*) 38 & 39 Vict. c. 92, s. 53: repealed for future purposes by the Agricultural Holdings Act, 1883 (46 & 47 Vict. c. 61), s. 62.

(*j*) S. 34.

feræ naturæ. Among the former are horses, kine, sheep, poultry, and the like, also "hounds, greyhounds, spaniels" (*k*), and the like; in these a man may have an absolute property which is personal. The latter may become the subject of a qualified property as deer in a park, game on an estate, fish in a pond, doves in a dove-house, and the like; which, so long as they are left at large in their natural condition, are considered as incident to the land and inheritance, in other words, as accessory to and partaking of the nature of the realty, and they descend to the heir. But the owner of the land has no true property in the animals left at large, for they belong to him only *ratione privilegii*, for his game and pleasure so long as they remain in the privileged place (*l*), and until there is a qualified property in them no larceny of them can be committed at common law (*m*). But if a man reclaim them, and confine them within his immediate power, they will, so long as they do not regain their natural liberty, be his personal property, and pass to his executors on his death (*n*).

Title-deeds.

The title-deeds of land so far partake of the nature of realty, that they pass with the land itself on its devolution from an ancestor to an heir, or by Will to the devisee (*o*): but if land is mortgaged by a deposit of the deeds as a security for the loan, they are considered personalty in the hands of the mortgagee, whose special property in them passes on his decease to his personal representative (*p*).

Land employed in trade.

The same property may at the same time be real for one purpose and personal for another. It frequently happens that for the purposes of trade, or the carrying on of public undertakings, the possession of land is requisite. For example, persons engaging in a commercial partnership for the manufacture of

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(*k*) Wentworth on Exors., p. 143.

(*l*) *The Case of Swans*, 7 Rep. 17. See further as to the property in animals *feræ naturæ*, Shep. Touch. 241, and Preston's note (33).

(*m*) Archbold, Justice of the Peace, tit. Larceny.

(*n*) 1 Wms. on Exors. 710; Wentworth on Exors. 143. See Wms. Pers. P., pp. 27, 28. See the leading case as to deer being reclaimable, *Morgan* v. *Earl of Abergavenny*, 8 C. B. 768. See also a curious case, *Hannam* v. *Mockett*, 2 B. & C. 934, in which it was held an action could not be maintained against a man for disturbing and driving away rooks, on the ground that the plaintiff could not have any property in them or shew any right to have them resort to his trees. The plaintiff had been in the habit of making profit by killing and taking the rooks and their young.

(*o*) See 1 Cruise, Dig. p. 46 (6); Wms. Pers. P. pp. 16—19, and *ante*, p. 11.

(*p*) Shep. Touch. 469.

sugar or of silks would require a factory for the purpose. Now supposing they acquire such a factory for an estate of inheritance in fee simple, the factory though in its nature realty, will, as between the partners and their representatives, (assuming it to be part of the common stock or capital of the partnership), be treated as personalty, and on the death of a partner his beneficial interest in the factory devolves not on his heir but on his personal representatives (*q*).

Again, nothing could well be more real and immovable than a railway. But the land on which a railway is constructed forms only part of the general capital of the company. The shareholders subscribe their money in the expectation of getting dividends out of the profit of the traffic, the working of the undertaking; and their shares in the whole concern are in the nature of personal and not real property. Thus, though the land occupied by the railway is in itself realty, and is liable to be rated as land (*r*), yet the undertaking itself and the profits of its working are personalty. It was in 1836 decided in a case relating to shares in the Chelsea Waterworks Co., that the shares were personal property, and that real property held for the purposes of a trading company was in equity to be deemed in the nature of personal estate (*s*).

(*q*) "The share of each of the partners s not a share in any specific asset or any specific part of the assets real or personal, but is his share of what will ultimately come to him when the accounts are ascertained, and when the assets are got in, the debts paid, and the amounts realised. But then, although there be the right of each partner in so much capital stock, which is personalty, and I should say in one sense is pure personalty, because it is personalty as between the real and personal estate, still it is exactly that which comes within the very words of the Statute" (of Mortmain, as an interest in land). "Whatever is the amount coming due to that partner, that partner has an immediate and direct charge or incumbrance on the land for that very sum, and his right is to have the land sold for the purpose of realising that charge or incumbrance which he has upon it;" *per* James, L. J., *Ashworth* v. *Munn*, 15 Ch. D. 369. See further, as to the nature of a partner's interest in lands, Lindley on Partn. (5th ed.). pp. 343 *et seq.* : and consider the distinction (*ibid.* p. 347) as to cases in which persons, though partners in profits, are only co-owners of the lands which yield them; *i.e.*, where the lands are not in fact partnership assets at all, although used for partnership purposes.

(*r*) *N. E. Ry. Co.* v. *Local Board of Leadgate*, L. R. 5 Q. B. 157; *Queen* v. *Midland Ry. Co.*, L. R. 10 Q. B. 389; *Queen* v. *London and North Western Ry. Co.*, L. R. 9 Q. B. 134.

(*s*) *Bligh* v. *Brent*, 2 Y. & C. 268. In the judgment of Alderson, B., the distinction is pointed out between the Chelsea Waterworks Company and the New River and Avon Navigation Companies, in which the shares were held to be real property. Now canal and railway shares are made personal property by the Acts of Parliament under which the companies are incorporated; and, by

Property in Conveyancing Act, 1881.

From what has been said, the definition of property in the Conveyancing and Law of Property Act, 1881, will be understood. In that Act 'property,' unless a contrary intention appears, includes "real and personal property, and any estate or interest in any property, real or personal, and any debt, and anything in action, and any other right or interest" (*t*).

Descent or distribution of property.

The reader will have noticed one main distinction which exists in English law between real and personal property in reference to its ownership. Real property (in the absence of any effectual disposition made by the owner whether by his will or by some form of alienation *inter vivos*, *i.e.*, taking effect in his lifetime) descends at his death to his heir or real representative, who is ascertained by the rules hereafter explained (*u*). Personalty, on the other hand, in such case devolves on the person (called the administrator) who is appointed by the Court, for distribution (after payment of debts) among the next of kin.

Lex situs.
Lex domicilii.

A leading distinction between movable and immovable property is, that, as to the latter, the rules of inheritance follow the *lex situs*, or *lex loci rei sitæ*, *i.e.* the law of the place where the immovable property is situate; while, as to the former, they are ascertained by the law of the domicile of the owner, or, as it is said, *mobilia sequuntur personam.*

"It is a clear proposition not only of the law of England, but of every country in the world where law has the semblance of science, that personal property has no locality. The meaning of that is, not that personal property has no visible locality, but that it is subject to that law which governs the person of the owner. With respect to the disposition of it, with respect to the transmission of it, either by succession or the act of the party, it follows the law of the person. The owner in any country may dispose of his personal property. If he dies, it is not the law of the country in which the property is, but the law of the country of which he was a subject (*x*), that will regulate the succession. For instance, if a foreigner having property in the funds here, dies, that property is claimed according to the right of representation given by the law of his own country" (*y*).

In the above passage, however, the term "personal property"

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the express provision of the Companies Act, 1862 (s. 22), shares in companies constituted under that Act are declared to be personal estate.

(*t*) 44 & 45 Vict. c. 41, s. 2 (i.), and see the definition in the Conveyancing Act, 1882 (45 & 46 Vict. c. 39), s. 1, (4) (i.).

(*u*) See chap. v., *post*.

(*x*) *Sic*, but there is a manifest error in the report; the sentence should run, "the law of the country in which he was domiciled."

(*y*) *Sill* v. *Worswick*, 1 H. Bl. 1690. See Westlake's Private International Law, § 261, 290. This principle is recognised in the Indian Succession Act.

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is not used with strict accuracy, for the propositions laid down are applicable, not to all "personal property" in the sense in which those words are used in English law, but only to so much of it as is included in the class of *mobilia*, a class which does not include chattels real, *i.e.*, leaseholds. This distinction, which has important consequences in English law, seems not to have been clearly apprehended until recently; at all events, the language of text-writers and even of learned judges is often such as is likely to mislead, unless the reader bears in mind the fact that the class "immovables" is not co-terminous with "real property," nor the class "movables" with "personal property."

"Immovables," says a learned writer, "are such things as land, houses, &c., whatever be the interest or estate which a person has in them. Hence the term includes what English lawyers call chattels real, or leaseholds" (*z*). He goes on (*a*) to observe that "Law is always concerned not with things but with rights, and not directly with immoveables or moveables, but with rights over or in reference to immoveables or moveables, or, to use popular language, with immoveable property and moveable property. It will serve to make clear the relation between the division into immoveables and moveables and the division into realty and personalty, if we treat each as a division, not of the subjects of property, but of the rights of which property, from a legal point of view, consists. Immoveable property includes all rights over things which cannot be moved, whatever be the nature of such rights and interests. Moveable property includes both rights over moveable things, or goods, and rights which are not rights over a definite thing, but are claims by one person against another; as the claim by A. to be paid a debt due to him by X., or *choses in action*. Realty, looked at as a division of rights, includes all rights over things which cannot be moved, except chattels real or leaseholds. Personalty includes both rights over moveables and choses in action. Hence immoveable property is equivalent to realty with the addition of chattels real; moveable property is equivalent to personalty with the omission of chattels real" (*b*).

(*z*) Dicey on Domicil, p. 36.

(*a*) *Ibid.* p. 38.

(*b*) Mr. Dicey proceeds to notice the apparent identification of "moveables" with "personal property" in the earlier cases, referring to the judgment of Lord Loughborough in *Sill* v. *Worswick*, cited in the text (*supra*), and also that of Abbott, C.J., in *Birtwhistle* v. *Vardill*, 5 B. & C. 451, 452. The distinction has

It is not within the scope of the present work to deal in any detail with the earlier history of the English law relating to real estate. It is assumed here that the reader has obtained some knowledge of the subject from other sources (*bb*); but it may be useful in this place to remind him of the meaning of some of the more important terms which constantly occur in the following pages, and without a clear understanding of which many of the existing rules of law relating to real property are not intelligible.

Tenure.

At the root of the English law of land lies the conception of Tenure; that is to say, the theory of our law is that a subject cannot be the absolute owner of land, but only a "tenant," or holder, of it for an "estate," *i.e.*, an interest giving him a right to the enjoyment of it for a period which is indefinite or uncertain as to its duration (*c*), but is not perpetual; and upon the determination of which the land reverts to the person of whom it is held, who is called the lord. All land is considered to have been originally vested in the Crown, and to have been granted by the Crown to its subjects—by the process known as infeudation (*d*).

A subject to whom land was thus granted might by sub-infeudation grant part of his holding to another person to hold of himself until sub-infeudation was prohibited by the Statute of

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been clearly drawn in *Freke* v. *Lord Carbery*, L. R. 16 Eq. 461, where it was held that the testamentary disposition of an English leasehold is governed by the law of England; and in *Duncan* v. *Lawson*, 41 Ch. D. 394, where it was held that leaseholds in England, belonging to a domiciled foreigner (*e.g.*, a Scotchman) devolve, in case of his intestacy, upon the persons entitled according to the English Statute of Distributions. See also *Hood* v. *Lord Barrington*, L. R. 6 Eq. 218; and Dicey on Domicil, p. 150 (Rule 20); *ibid.* Appendix, Note iv. On the other hand, slaves on a West India plantation, who were certainly in the nature of moveables, were held to be devisable as real estate; *Richards* v. *A.-G. of Jamaica*, 6 Moo., P. C. 381; S. C., 13 Jur. 197; see *Ex p. Rucker*, 3 Dea. & Ch. 704; *Stewart* v. *Garnett*, 3 Sim. 398. But they were impressed with the character of personalty from the passing of the Slavery Abolition Act, 3 & 4 Will. IV. c. 73; *Richards* v. *Att.-Gen. of Jamaica*, 6 Moo. P. C. 381.

(*bb*) *E.g.*, Mr. Digby's History of the Law of Real Property.

(*c*) We here exclude leases for years, which were not regarded by the ancient common law as estates: see *post*, p. 150. As to what is meant by an "estate," see *post*, p. 28, note (*b*), and see Digby, R. P. 59.

(*d*) Co. Litt. 65*a*; *Ib.* 191a, and Butler's note. The former Editions of this work contained in Pt. II. of the Introduction some remarks on Tenure and the Feudal System which have been omitted in the present Edition for reasons stated in the Preface. On the subject of Tenure the reader is referred to Digby, Hist. R. P., Part I., Ch. I., s. 2; Challis on Real Property, Part I., "On Tenure"; Leake on Property in Land, Part I., Ch. I., Section 1; the "Preliminary Dissertation on Tenures" at the commencement o Cruise's Digest, and Mr. Butler's note, Co. Litt. 191*a*.

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Quia Emptores (18 Edw. I. c. 1, A.D. 1290). In such cases the Crown was lord paramount, and its immediate tenant (who was called tenant *in capite*) was lord (called *mesne* lord) as regards the tenant holding by sub-infeudation (*e*), who is sometimes called "tenant paravail." This process of sub-infeudation might be repeated indefinitely. The relation between lord and tenant involved certain obligations on both parties. The obligations of the tenant are generally called "services."

The ordinary tenure of land in England is known as freehold; and all land is presumed to be of freehold tenure until the contrary is proved (*f*). It is the common law tenure, as distinguished from local tenures which depend upon the customs of particular places, and of which the most important is that which is known as copyhold, and is hereafter treated of in some detail (*g*).

Estates of freehold might be either for life only, or of inheritance, *i.e.*, descendible to the heirs of the tenant; but the ancient common law did not recognise any estate less than a life estate (*h*).

Seisin.

The ancient mode of creating or transferring an estate of freehold was by putting the tenant in possession of the land by the process known as "livery of seisin." The term "seisin" has in comparatively modern times been restricted to the possession of land for a freehold estate; but originally it was synonymous with possession, whether of land or personal chattels (*i*). The process of conveyance or investiture by means of livery of seisin is called a feoffment; and the estate which the feoffee (or person to whom livery of seisin was made) was to take was generally, though not necessarily, evidenced by a deed, or "charter," of feoffment, which marked out or limited that estate.

The system of tenure required that there should always be a tenant of the freehold in possession to render the services to the lord. If there were no such tenant, so that the possession was vacant, it was said that the seisin, *i.e.* the immediate freehold, was in abeyance (*k*). Many of the rules of law with regard to the validity of limitations of estates to different persons in succession depend upon this elementary doctrine.

(*e*) Land is presumed to be held *in capite*, *Doe* v. *Redfern*, 12 East, 96.

(*f*) Challis, R. P. 3.

(*g*) *Post*, ch. xiii.

(*h*) The term "freehold" is sometimes used to mean a life estate as opposed to an estate of inheritance; Coke, Cop. s. 15 (cited in 1 Cruise, Dig. 48, s. 15).

(*i*) See 1 Law Quarterly Rev. 324; 2 *Ib.* 481; and *post*, p. 144, note (*q*).

(*k*) Co. Litt. 342b.

Present and future estates.

Where the tenant in immediate possession has a limited estate, as for life, the persons entitled to possession after the expiration of his estate, have future estates. The only future estates known to the ancient common law were either remainders or reversions (*l*).

Legal and equitable estates.

Rights and duties in respect of freehold estates were enforced by the Courts of common law, which recognised only the tenant who could prove a title created in the manner prescribed by the common law. When the practice arose of making a feoffment to one person to hold "to the use" of, or in trust for, another, the common law refused to recognise the latter as having any legal rights. It regarded only the common law or "legal" estate. The *cestui que use*, or person for whose use the legal tenant was seised, obtained the recognition of his rights from the jurisdiction of the Court of Chancery which administered equity; and thus arose equitable estates or interests as distinguished from legal estates. The right of the beneficial owner in equity was regarded as originating in a contract which the Court of Chancery compelled the legal tenant to perform. It will be noticed that the common law doctrines as to abeyance of the seisin were inapplicable to the equitable use or beneficial ownership; and it followed that estates or interests might be created by way of use, (*i.e.* as equitable estates) which would not have been allowed by the common law to be good, *i.e.* which could not be created as legal estates.

The operation of the Statute of Uses (27 Hen. VIII. c. 10), as hereafter explained (*m*), was to turn, in certain cases, uses or equitable interests into legal estates, and thus to enable the creation of legal estates which could not have been created by the common law method of conveyance. That method involved an actual livery of the seisin, and was therefore from its nature restricted in its operation: but the Statute operated independently of livery of seisin.

(*l*) See the difference between them explained, *post*, Chap. viii., p. 219.

(*m*) *Post*, Chap. x.

CHAPTER II.

[illegible] ESTATES [illegible]

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[illegible]

[illegible] and [illegible] personality [illegible] as applic-

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[illegible] persons to [illegible] succession [illegible] the thing, [illegible] be post- [illegible] may be con-

[illegible] that in [illegible] "substitution" [illegible] power, the [illegible] and see [illegible] as [illegible] nature of what [illegible] remainder in tail. [illegible] inheritance, [illegible] years, tenancy by [illegible] or the [illegible] tene- [illegible] See the divi- [illegible]

[illegible] it [illegible] —"The [illegible] and the estate [illegible] for an [illegible] in the land, [illegible] are diver- [illegible] more than [illegible] who has a [illegible] in land

able only to real and not to personal property. Personal property is essentially the subject of absolute ownership, and is not held for any estate. If it be desired to settle, that is, to create successive interests in, personal property, the proper course is to transfer it to trustees, and by a declaration of trust to define the mode of beneficial enjoyment. Thus, in order to create a succession of interests in stock in the Public Funds, in such a way as to settle it, on the occasion of a marriage, for example, on parents for life, and after their death on their children, the course is to transfer the stock into the names of trustees in the Bank-books, and then direct the trustees to hold it for the objects desired. The effect is that the actual enjoyment of the property is secured to the parents and the children, but the legal ownership of the stock and the power of transferring the legal ownership are vested in the trustees alone.

Quantity of—duration.

Quality of—mode of enjoyment.

The different estates in real property may be considered first with reference to the time of their continuance, and secondly with reference to the mode of their enjoyment, and their nature, incidents, and other collateral qualifications, such as their being in possession, or in reversion or remainder, absolute or conditional (*c*). The former may be termed the Quantity of the estate, the latter its Quality. As regards continuance, or duration, the estate may be one which is to subsist only for a restricted period, which period may be either of uncertain or of certain duration; (for examples, the life of an individual, or a fixed term of years); or it may belong to the holder and his heirs for ever. As regards mode of enjoyment, the whole estate may be vested in one individual, *i.e.*, as the law terms it, be held "in severalty"; or it may be vested in a plurality of holders "jointly" or "in common," or "in coparcenary."

Estates in freeholds

We will first consider the nature of the various estates in lands

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without end, or land for time without end; and he who has land in tail has a time in the land, or the land for time, as long as he has issue of his body; and he who has an estate in land for life has no time in it longer than for his own life; and so of him who has an estate in land for the life of another, or for years."

Bacon (Tracts, p. 337) says: "All estates are but times of their continuances. There are two substantial and essential differences of estates, the one limiting the times, and the other maketh difference of possession, as remainder; all other differences of estates are but accidents."

(For the references to Plowden & Bacon we are indebted to Mr. Leake, Law of Prop. in Land; Introd. p. 4.)

(*c*) 6 Cruise, Dig. 475, note, citing Preston on Estates, 7.

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of free tenure or freehold (*d*), and then leaseholds or chattels real, or, as they are sometimes called, estates "less than freehold."

An estate of freehold is an estate in lands of free tenure, as distinguished from lands of copyhold or customary tenure, and is held for an uncertain period, as distinguished from a fixed term of years. It is an estate which if in possession could not formerly be created or conveyed without livery of seisin (*e*). In order to create an estate of freehold three things are necessary and sufficient:

(1.) The subject-matter must be land or some interest derived out of or annexed to land. It is impossible that any interest in personalty should be freehold.

(2.) That land must be of free tenure.

(3.) The period for which the estate is held must be uncertain. It may be thought that a limitation to A. for a term of years if he shall so long live is freehold on account of the possibility that he will die within the term; but this is not the case, as the utmost duration of the estate is the term which is fixed (*f*).

A copyholder is sometimes spoken of as having a freehold interest in his land. Though this phraseology is not strictly speaking correct, it will not lead the student into error, if he remembers that all that is meant is that he has an interest in the land which would amount to an estate of freehold if the land had been of free tenure.

A freehold estate may be for life only, or be of inheritance, that is, in tail or in fee.

II. Estate for life (*g*).

As to an estate for life. This is an estate held, or capable of being held, during the subsistence of a life or lives. We say "capable of being held," as well as one held, because an estate which, though subject to a possibility of earlier determination, possesses the capability of enduring for life, is measured by the latter quality rather than the former, and is treated as an estate

(*d*) "Tenant in fee, tenant in tail, and tenant for life, are said to have *frank tenement*, a freehold; so called because it doth distinguish it from terms of years, chattels upon uncertain interests, lands in villenage, or customary or copyhold lands. . . . And note that tenant by statute merchant, statute staple, or *elegit*, are said to hold land *ut liberum tenementum* until their debt be paid; and yet in troth they have no freehold but a chattel which shall go to the executors;" Co. Litt. 43*b*. See also Challis, R. P. pp. 6, 7; Digby, R. P. 134; Wms., R. P. 26.

(*e*) Co. Litt. 48*a*.

(*f*) Co. Cop. s. 15; Cruise, Dig. vol. p. 47, s. 12.

(*g*) Co. Litt. 41*b*; Challis, R. P. 273

for life. Thus, an estate in dower, vesting in a widow, was said to be an estate for life, even when (as it still is, in gavelkind) it was in fact one for widowhood only, and determinable accordingly on a second marriage (*h*). And so it is "if a man grant an estate to a woman *dum sola fuit*, or *durante viduitate*, or *quamdiu se bene gesserit*, or to a man and a woman during the coverture, or as long as the grantee dwell in such a house, ... or for any like incertain time, ... in all these cases the lessee hath an estate for life determinable" (*i*).

"Natural life."

Formerly an estate granted to a man for his life determined in his lifetime if he entered into a monastery and became "professed in religion" (*k*). Hence in the creation of estates of this nature it was usual at one time (*l*) to adopt the form of limiting the interest to the party for his "natural life."

Estate pur autre.

The life for which the estate is held may be either that of the person to whom the grant is made, or it may be the life of some other person, or even a plurality of lives. For example, the limitation may be to A. for his life, or to A. for the life of B., or for the lives of B., C., and D. In either of the latter cases, the person or persons, on whose life or lives the existence of the estate is dependent, is or are called the *cestui que vie* or *cestuis que vie*.

It is the opinion of some authorities that an estate for the life of the grantee was originally the largest estate granted to another by any lord of the soil, and that it was not until feuds had begun to prevail more extensively that the estate of the tenant under a grant came to be descendible to his heirs (*m*), or capable of alienation. The right of every freeman, subject to certain restrictions, to sell at his own pleasure was recognized by 18 Ed. I. c. 1 (*Quia Emptores*). The power of testamentary alienation was given as to estates in fee simple by 32 Hen. VIII. c. 1, and

(*h*) "It is curious to observe the several revolutions which the doctrine of dower has undergone, since its introduction into England. It seems first to have been of the nature of the dower in gavelkind; viz., a moiety of the husband's lands, but forfeitable by inconsistency or a second marriage. By the famous charter of Henry I. this condition of widowhood and chastity was only required in case the husband left any issue, and afterwards we hear no more of it." (2 Bl. 133.)

(*i*) Co. Litt. 42*a*; Shep. Touch. 107.

(*k*) Co. Litt. 132*a*. Foreign profession was never a cause of forfeiture; 2 Roll. Ab. 43; *Graunts*, C. Profession appears not to be now a cause of forfeiture; *Re Metcalfe's Trusts*, 2 De G. J. & S. 122.

(*l*) Co. Litt. 132*a*.

(*m*) This statement is very questionable as applied to English law: see note (*p*), p. 32, *infra*. And as to the earlier history of the right to alienate land in England, see 2nd Instit. 65.

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as to estates held for the life of another by 29 Car. II. c. 3, s. 12 (*o*).

So completely has the theory that nothing short of an actual estate limited to the grantee for life constitutes an estate of freehold been retained even to the present day, that if a long term of years, longer than any probable duration of life, is granted to an individual, but determinable on his death—say, for example, a term of 99 or even 500 years to A., if A. should so long live,—still this is regarded not as an estate of freehold in the grantee, but as a chattel interest only, and as being personal and not real property. Yet practically it is difficult, as regards the actual quantum of interest, to draw much distinction between an ownership created in the form of a grant to an individual for his life, and one granted to him for a term of years to cease on his death, where the term is so long as to exceed the possible duration of his life.

Gift to A. B.

It might be supposed, that, were one in terms to give an estate to another, even without the addition of words indicative of an intention to extend the gift to his descendants—for example to A. B. simply, instead of to A. B. and his heirs, A. B. would take an absolute estate; and so it would be if, instead of land, the subject of gift were some moveable chattel or subject of personal property, as a horse, a sum of money, or even a lease for years in land itself. But it would be a misconception to suppose this with respect to land. The actual extension in terms to the heirs of the grantee was always necessary when it was sought to extend the grant, so as to confer a descendible interest on the grantee. Hence in any feudal grant, in the absence of words of inheritance, that is, of the introduction of words of "limitation," as they are called, to the heirs, it was understood to have been the intention to limit the interest to the grantee for life only: and when grants of this nature came to be subjected to the exposition of the Courts, it was this construction which was adopted, and a grant to A. was held to confer on A. this restricted interest only (*p*). In the case of estates created

(*o*) *i.e.*, the Statute of Frauds.

(*p*) Feuds became hereditary about a century before the conquest, at which time the law of England was profoundly modified by the doctrines of the feudal law introduced by the Norman lawyers. No conveyances of English lands made during the first century after the Conquest are known to exist; but it is most probable that the Norman lawyers employed the forms to which they were accustomed, and used the word "heirs" when they wished to confer an hereditary interest. However this may be, the distinction

by deeds, this principle of construction prevails to the present day; and a limitation by deed simply to A. confers on A. no greater estate than for his life (*q*); and that notwithstanding the maxim that every grant is to be construed most strongly against the grantor, unless in the case of grants by the Crown (*r*). Even in the case of Wills, made before 1838, unless an opposite intention was manifestly made out on the context, the like construction prevailed. But the Wills Act (*s*) has, so far as regards wills made after 1837, reversed the presumption of intention, enacting:—

> S. 28. "Where any real estate shall be devised to any person without any words of limitation, such devise shall be construed to pass the fee simple, or other the whole estate or interest which the testator had power to dispose of by Will in such real estate, unless a contrary intention shall appear by the Will."

But while the law on the one hand (subject to the exception in testamentary cases), in the absence of words of inheritance, restricts to an ownership for life the estate granted; on the other hand, even if there are no words actually defining the ownership to be for the life of the grantee, as in the case where the grant is "to A. B." without more, it implies an intention to assure to the party at all events an interest of not less than that amount, in case the grantor has power (*i.e.*, a sufficient estate) to make such a grant. This is an application of the maxim referred to just now, namely, that every grant is to be construed most strongly against the grantor; for an estate for a man's own life is considered more beneficial and of a higher nature than an estate for any other life (*t*).

How created.

So completely does the law assign to an estate for life a freehold character, that it can only be created or transferred by the class of assurances (*i.e.*, forms of conveyance) adapted to the creation or transmission of freeholds and freehold interests, a fact to which reference has already been made. The nature of this class of assurances will be more fully considered in a future chapter (*u*).

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between grants containing the word "heirs" and those from which it is absent has always been recognised at the common law.

(*q*) Elph. N. & C. Interp. 295.

(*r*) 2 Bl. 121; Elph. N. & C. Interp. 93. The Conveyancing Act, 1881 (44 & 55 Vict. c. 41), s. 51, makes no alteration as regards the limitation of life estates.

(*s*) 1 Vict. c. 26. See Hawkins on Wills, 130.

(*t*) 2 Bl. 121; Co. Litt. 42*a*. See also Co. Litt. 183*a*, quoted in Elph. N. & C. Interp. 94, 95; Shep. T. 107.

(*u*) See p. 83, and chap. xiv.

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Pur autre vie (*x*).

The ordinary estate for life, then, is that granted to a person for his own life. But, as pointed out above, the ownership may be conferred for the life of another; and this may take place either by an original grant out of an estate in fee simple, or where a person, being himself tenant for life only, grants to another his own estate, in which case the interest acquired by the grantee is limited to the duration of the life of the grantor. In these instances, the estate is described as being held *pur autre vie*, that is to say, for the life of another, and the grantee is called tenant *pur autre vie* (*y*).

One singular incident attached to an ownership of this nature. Supposing the words limiting the estate to the tenant *pur autre vie* did not include his heirs or personal representatives, *i.e.*, if the grant was "to A." simply, there might be a hiatus or gap in the tenancy. This might arise in two manners: first, if the owner in fee simple made a grant to A. for the life of B.; secondly, if B., being tenant for his own life, assigned his life estate to A.; in either case, if A. were to die during the life of B., there would be no person entitled to succeed to the property. In the first case, the grantor having parted with the property during the life of B. would have no right of re-entry during B.'s life; in the second case, the grantor, having parted with all his estate, could never have a right of re-entry; and in either case, as A. took the estate *pur autre vie* during his own life only, there would be nobody entitled to claim through representation to him. The possession, or at least the right to it, would therefore become vacant, and the first person who entered would formerly have been entitled to retain this possession during the life of the *cestui que vie*. To a possession thus acquired, the law assigned the title of a General Occupancy, and the person obtaining it was styled a

General occupant (*z*).

(*x*) Co. Litt. 41*b*.

(*y*) An estate *pur autre vie* may arise:—"(1.) By express limitation, which is either to a grantee simply, during the life of *cestui que vie*, or to a grantee and his heirs during such life. . . . (2.) By the assignment to another person of an existing estate for life, which latter estate may have arisen either by act of parties, or by operation of law, as curtesy or dower; and the assignment is, like the express limitation, either to the grantee simply, or to him and his heirs, during the life of *cestui que vie*." Challis, R. P. p. 286. Other cases noticed by Mr. Challis were (formerly) where a life estate was cast upon the Crown by forfeiture for treason: the estate of "a general occupant" as to which see the text *infra*; and the estate cast upon the personal representative of tenant *pur autre vie* since the Statute of Frauds: as to which see p. 35, *infra*.

(*z*) See Co. Litt. 41*b*. and Hargrave's notes; 1 Cruise Dig. 110: *Holden* v. *Smallbrooke*, Vaugh. 187. There could

General Occupant, and was entitled to the estate for his own benefit. But this result might be avoided by the extension of the limitation to the representatives of the person to whom the grant was made (*a*). Thus, for example, in the case put of the alienation by the tenant for life, if, instead of confining the limitation to A., it had been to A. and his heirs, or to A. and his executors (*b*), the estate upon the death of A. would have devolved, in the former instance, on his heirs, and in the latter on his executors, for the whole duration of B.'s life. The heir, in this case, was termed a Special Occupant, in contradistinction to the other species of occupancy pointed out, namely, a general one. Still, even the power of extension to the heirs or executors in the limitation was but a partial remedy. In the first place, words of limitation to the heirs or executors might through inadvertence be omitted; and even the introduction of them would neither have made the estate disposable by the will of the owner nor have subjected it in the hands of his representatives after his death to his debts. Among the grievances to the removal of which the celebrated Statute of Frauds (*d*) was addressed this formed one. Power was given by that statute to the tenant *pur autre vie* to dispose of his estate by will, and, if not devised, it was made chargeable in the hands of his heir taking as special occupant, as assets by descent, as in the case of lands in fee simple; and in case there was no special occupant, the estate was made to devolve on his executors or administrators, and be assets in their hands (*e*). The provisions of that statute are the basis of the existing provisions of the Wills Act. That Act (*f*) extends the power given to every person to devise, bequeath, or dispose by will to estates *pur autre vie*, whether there shall or shall not be any special occupant. And it enacts:—

Special occupant (*c*).

Statute of Frauds.

Wills Act.

S. 6. "That if no disposition by will shall be made of any estate *pur autre vie* of a freehold nature, the same shall be chargeable in

be no general occupant of incorporeal hereditaments, Co. Lit. 41*b*, nor of copyholds, *Smartle* v. *Penhallow*, 6 Mod. at 66.

(*a*) See Co. Litt. 41*b*.

(*b*) See Hargrave's note (240) to Co. Litt. 41*b*.; where it is treated as a moot point whether before the statutes 29 Car. II., c. 3, and 14 Geo. II., c. 20, the executor or administrator could take even though named in the grant. See this question discussed in Cruise Dig. vol. i. pp. 111, § 49 *et seq.*; Challis, R. P. pp. 288, 289; *Northen* v. *Carnegie*, 4 Drew, 587—591.

(*c*) See Law Quarterly Review, vol. 6, p. 230.

(*d*) 29 Car. II. c. 3, s. 12, set out in 1 Cruise Dig. 111.

(*e*) *Doe* v. *Lewis*, 9 M. & W. 661. See Co. Litt. 41*b*, note (5).

(*f*) 1 Vict. c. 26, s. 3.

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the hands of the heir, if it shall come to him by reason of special occupancy, as assets by descent (*g*), as in the case of freehold land in fee simple; and in case there shall be no special occupant of any estate *pur autre vie*, whether freehold or customary freehold, tenant right, customary or copyhold, or of any other tenure, and whether a corporeal or incorporeal hereditament, it shall go to the executor or administrator of the party that had the estate thereof by virtue of the grant; and if the same shall come to the executor or administrator, either by reason of a special occupancy (*h*) or by virtue of this Act, it shall be assets in his hands, and shall go and be applied and distributed in the same manner as the personal estate of the testator or intestate."

Thus the general occupant was got rid of, and the estate was made liable to the deceased holder's debts, into whosesoever hands it came.

Questions arose, upon the construction of this enactment, in case of an estate being limited to A. and his heirs for the life of B., first, where A. devised the property to C. and his assigns, and C. died intestate, but having heirs; and, secondly, where A. devised to trustees in trust for D., his heirs, executors, administrators, and assigns, and D. died without heirs (being illegitimate, and unmarried, and intestate): to whom did the devised estates respectively pass on the deaths of C. and D. respectively? It was decided, in both cases, that they passed to the personal representative of C. and D. respectively, though in the latter case he would be the nominee of the Crown (*i*).

6 Ann. c. 18.

There remains to be noticed the Statute 6 Anne, c. 18. This was passed to prevent the death of the *cestui que vie* being concealed, and enables anyone claiming to be entitled after his death to obtain from the Lord Chancellor an order for his production; and if he is not produced, he is to be taken as dead (*k*).

Alienation.

A tenant for life, of whatever description, has the like power

(*g*) "The lands descended were called 'assets by descent,' from the French word *assez*, 'enough,' because the heir was bound only so far as he had lands descended to him enough or sufficient to answer the debt or contract of his ancestor."—Wms. R. P. 100, referring to 2 Bl. 243.

(*h*) Thus recognizing the form of express limitation to the executor or administrator as special occupant.

(*i*) This was decided in *Doe* d. *Lewis* v. *Lewis*, 9 M. & W. 662, distinguished in *Wall* v. *Byrne* (*per* Ld. St. Leonards), 2 Jo. & Lat. 118; and in *Reynolds* v. *Wright*, 25 Beav. 100 (on appeal, 2 De G. F. & J. 590, *per* Ld. Campbell, L. C.), in which *Doe* v. *Lewis* was followed. In *Reynolds* v. *Wright* it was further decided that the enactment applied as well to equitable as to legal estates.

(*k*) For recent applications of this statute, see *Re Stevens*, 31 Ch. D. 320; *Re Pople*, 40 Ch. D. 589.

Attorn = To agree to become [illegible] to a landlord to whom the estate on which one is located is about to pass by reversion.

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of alienation over his estate as the holder of a larger estate, though limited of course to the duration of the estate itself—that is, the subsistence of the life or lives for which it is held. For this period he may lease, mortgage, or sell it, and it is subject in his hands to be taken in execution for his debts, and on his bankruptcy will pass to the trustee. His own interest, however, must of course be the limit of his alienation.

Conveyance—tortious;

At common law a conveyance by a tenant for life of an estate greater than one for his own life operated as a forfeiture of his estate (*l*) in the case of corporeal hereditaments; but a grant of incorporeal hereditaments did not create a forfeiture. He could make such a conveyance of corporeal hereditaments in two different manners: first, in pais, by feoffment; secondly, by matter of record, as by fine or recovery. He also incurred a forfeiture by claiming either as plaintiff or defendant in a real action an estate greater than an estate for life, or by affirming in such an action that the remainder or reversion was in a stranger, or by attorning to a stranger by matter of record. As real actions are now, with some few exceptions, abolished (*m*), and as a feoffment is deprived of its tortious operation by the Act to amend the Law of Real Property (*n*), the only way in which a tenant for life as such can now forfeit his estate is by attorning to a stranger by matter of record. Conveyances (*o*) by way of bargain and sale inrolled, or by lease and re-lease, or deed of grant, pass only that which the grantor can lawfully convey. They are therefore said to be innocent conveyances, and, if a tenant for life purports to convey an estate greater than one for his own life by such a conveyance, he incurs no forfeiture.

—innocent.

Emblements.

In some special instances, the interest of a tenant for life is extended for certain purposes even beyond the expiration of his estate. It has been already explained (*p*) what are Emblements, and it will be remembered that in the case of a tenant for his own life sowing the land, but dying before harvest, his executors have a right to the crop as a return to the tenant for his outlay. This right to emblements is not confined to the case in which the life on which the holding is dependent is that of the tenant himself. It exists (as modified by the statute about to be mentioned) in the case in which he is tenant *pur autre vie*. If the

(*l*) Co. Litt. 251*a et seq.*
(*m*) *Ante*, p. 7.
(*n*) 8 & 9 Vict. c. 106, s. 4.
(*o*) See these explained, *post*, Ch. xiv.
(*p*) *Ante*, p. 17.

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cestui que vie, or person on whose life the term was held, died after the corn was sown, the tenant *pur autre vie* is entitled to the harvest.

That which applies to the tenant for life applies also to his under-tenant, and even to a greater extent; for if the life estate should determine by the tenant's own act, as by the marriage of a widow holding during widowhood, the tenant herself would have no right; but the act of the tenant is not to deprive the under-tenant, who could not prevent it, of the right (*q*).

In 1851, "to prevent or lessen the evils of the right to emblements, and the loss and injury arising therefrom," an Act was passed (*r*), by which it was provided that on the determination of leases or tenancies held by tenants at rack-rent (*s*) under a tenant for life or for any other uncertain interest, instead of being entitled to emblements, the tenant should continue to hold on the same terms to the end of the current year of his tenancy.

Apportionment of rent.

In consequence of the determination of the estate of a tenant for his own life immediately on his death, if he had let the lands and died between two rent-days, there was no one to whom his lessee was liable to pay rent, for no part of the rent was considered to accrue until the day on which it was payable; in other words, at Common Law rent was not apportionable. To remedy some of the mischiefs and inconveniences thereby arising, various statutes have been passed, commencing with 11 Geo. II. c. 19 (*t*), and in 1870 the Apportionment Act was passed (*u*) by which it was provided that all rents (whether reserved or made payable under an instrument in writing or otherwise) should, like interest on money lent, be considered as accruing from day to day, and be apportionable in respect of time accordingly; but (s. 7) the Act is not to apply where it is expressly stipulated that no apportionment shall take place.

"Every tenant for life," says Blackstone (*x*), "unless restrained by

(*q*) 2 Bl. 123.

(*r*) 14 & 15 Vict. c. 25.

(*s*) "Rack-rent" is not used by lawyers in the meaning of extortionate rent. It means the best rent that can reasonably be obtained; 3 Dav. Prec. 187 *et seq.*

(*t*) See it set out in Smith (J. W.) on Landlord and Tenant, sect. v., pp. 186, 187.

(*u*) 33 & 34 Vict. c. 35, ss. 2 and 7. See *Swansea Bank* v. *Thomas*, 4 Ex. D. 94; *Constable* v. *Constable*, 11 Ch. D. 681.

(*x*) Vol. ii. 122.

covenant or agreement, may (*y*) of common right take upon the land demised to him reasonable 'estovers' or 'botes,' for he hath a right to the full enjoyment and use of the land and all its profits during his estate therein."

Estovers.

"Estovers," from *estoffer*, to furnish, is a liberty of taking necessary wood for the use or furniture of a house or farm; and "bote" is a Saxon word of the same signification (*z*).

Waste (*zz*).

But a tenant for life must not do, or suffer to be done, anything which may be destructive of, or otherwise injurious to, the inheritance—that is, to the permanent substance of the property in his possession. This, in technical language, is termed "committing Waste"; which may be either Voluntary or Permissive.

a. Voluntary.

Voluntary Waste consists in such acts as are destructive of the premises themselves, for instance, pulling down buildings, cutting down timber, ploughing up ancient meadow-land, opening mines for the procuring from underneath the surface coal or other mineral—or even digging for gravel, brick earth, or stone. Mines, however, already opened, may be continued to be worked, and clay, gravel, &c., may be dug out of pits already open (*a*). In *Phillipps* v. *Smith*, Alderson, B., said:—

"The principle upon which Waste depends is well stated in the case of *Lord Darcy* v. *Askwith* (Hobart, 234), thus:—'It is generally true that the lessee hath no power to change the nature of the thing demised; he cannot turn meadow into arable, nor stub a wood to make it pasture, nor dry up an ancient pool or piscary, nor suffer ground to be surrounded, nor destroy the pale of park, for then it ceaseth to be a park; nor he may not destroy the stock or breed of anything, because it disherits and takes away the perpetuity of succession, as villains, fish, deer, young spring of woods, or the like.' Thus, the destruction of germins, or young plants destined to become trees (*b*), which destroys the future timber, is Waste, the cutting of apple-trees (*c*) in a garden or orchard, or the cutting down a hedge of thorns (*d*), which changes the nature of the thing demised, or the eradicating or unseasonable cutting of white-thorns (*e*), which destroys the future growth, are all acts of Waste. On the other hand, those acts are not Waste which, as Richardson, C.J., in *Barret* v. *Barret* (Hetley, 35) says, are not prejudicial to the inheritance; as, in that case,

(*y*) *I.e.*, as Coke puts it, "the law as incident to his estate without provision of the party" gives him the right to estovers; "and these estovers must be reasonable. . . . And the same estovers that tenant for life may have, tenant for years shall have;" Co. Litt. 41*b*.

(*z*) See Elph. N. & C. Interp. 563, *s.v.* Bote.

(*zz*) Co. Litt. 41*b*; 2nd Inst.

(*a*) *Viner* v. *Vaughan*, 2 Beav. 466. Further, as to what is "voluntary" or "positive" waste, and what is not, see *Phillipps* v. *Smith*, 14 M. & W. 589.

(*b*) Co. Litt. 53*a*.

(*c*) Coke says "any fruit-trees growing in the garden or orchard:" Co. Litt. 53*a*.

(*d*) Co. Litt. 53*a*.

(*e*) Vin. Abr. "Waste" (R.).

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the cutting of sallows, maples, beeches, and thorns, there alleged to be of the age of thirty-three years, but which were not timber either by general law or particular local custom. So, likewise, cutting even of oaks or ashes where they are of seasonable wood—*i.e.*, where they are cut usually as underwood, and in due course are to grow up again from the stumps, is not Waste" (*f*).

Timber.

"Timber" trees are such as serve for building or repairs of buildings. Oak, ash, and elm, are timber trees in all places; what else are, depends on the local custom: in some places, beech and whitethorn are (*g*).

When timber was going to decay, as by reason of its standing too thickly in the woods and plantations, the Court of Chancery, on the application of the tenant for life, would order it to be cut down and sold, and give the interest of the money to the tenant for life (*h*).

In the case of *Honywood* v. *Honywood* (*i*) Jessel, M.R., thus stated the law as to what the tenant for life may cut and what he may not:—

"As I understand the law, it is this: The tenant for life may not cut timber. The question of what timber is depends, first, on general law, that is, the law of England; and, secondly, on the special custom of a locality.

"By the general law of England, oak, ash, and elm are timber, provided they are of the age of twenty years and upwards, provided also they are not so old as not to have a reasonable quantity of useable wood in them, sufficient, according to a text-writer (*k*), to make a good post. Timber, that is, the kind of tree which may be called timber, may be varied by local custom. There is what is called the custom of the country, that is, of a particular county or division of a county, and it varies in two ways. First of all, you may have trees called timber by the custom of the country—beech in some counties, hornbeam in others, and even white-thorn and black-thorn, and many other trees are considered timber in peculiar localities—in addition to the ordinary timber trees. Then, again, in certain localities, arising probably from the nature of the soil, trees of even twenty years old are not necessarily timber, but may go to twenty-four years, or even to a later period, I suppose, if necessary; and in other places the test of when a tree becomes timber is not its age but its girth. These, however, are special customs. Once arrive at the fact of what is timber, the tenant for life,

(*f*) *Phillipps* v. *Smith*, 14 M. & W. 593.

(*g*) Co. Litt. 53*a*; and see the instances of local customs as to timber given in 1 Cruise Dig. p. 116 (Tit. III. s. 7). Larch trees are not timber. See as to windfalls of larches, *In Re Harrison's Trusts*, 28 Ch. D. 220, and *In re Ainslie*, 30 Ch. D. 485.

(*h*) *Tooker* v. *Annesley*, 5 Sim. 135. See now Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 35, and *post*, p. 41.

(*i*) L. R. 18 Eq. 306, 309. On the question in whom is the property in the trees cut down vested, see continuation of passage quoted.

(*k*) Gibbons on Dilapidations, p. 215.

impeachable for Waste, cannot cut it down. That I take to be the clear law, with one single exception, which has been established principally by modern authorities in favour of the owners of timber estates—that is, estates which are cultivated merely for the produce of saleable timber, and where the timber is cut periodically. The reason of the distinction is this, that as cutting the timber is the mode of cultivation, the timber is not to be kept as part of the inheritance, but part, so to say, of the annual fruits of the land, and in these cases the same kind of cultivation may be carried on by the tenant for life that has been carried on by the settlor on the estate, and the timber so cut down periodically in due course is looked upon as the annual profits of the estate, and therefore goes to the tenant for life. . . . .

"The next question to be decided is, what can the tenant for life cut? The tenant for life can cut all that is not timber, with certain exceptions. He cannot cut ornamental trees, and he cannot destroy 'germins,' as the old law calls them, or stools of underwood; and he cannot destroy trees planted for the protection of banks, and various exceptions of that kind; but, with those exceptions, which are Waste, he may cut all trees which are not timber, with again an exception, that he must not cut those trees which, being under twenty years of age, are not timber, but which would be timber if they were over twenty years of age. If he cuts them down he commits Waste, as he prevents the growth of the timber. Then, again, there is a qualification that he may cut down oak, ash, and elm, under twenty years of age, provided they are cut down for the purpose of allowing the proper development and growth of other timber that is in the same wood or plantation. That is not Waste; in fact it is for the improvement of the estate, and not the destruction of it, and therefore he is allowed to cut them down."

By the Settled Estates Act, 1877 (*l*), power is given to the Chancery Division of the High Court, if it shall deem it proper and consistent with a due regard for the interests of all parties, from time to time to authorize a sale of any timber (not being ornamental timber) growing on any settled estates. And the Settled Land Act, 1882 (*m*), empowers the tenant for life (*n*) impeachable for waste in respect of timber—that is, not having the legal right to cut timber—on obtaining the consent of the trustees of the settlement or an order of the Court, to cut and sell timber ripe and fit for cutting; three-fourths of the net proceeds are to be set aside as capital, and the other fourth to go as rents and profits.

b. Permissive.

Permissive Waste consists in passive conduct which permits decay; as, for example, suffering buildings to fall into ruin.

(*l*) 40 & 41 Vict. c. 18, s. 16 (repealing the Act 19 & 20 Vict. c. 120, commonly called the Settled Estates Act, 1856, which contained, in s. 11, a similar provision, and subsequent amending Acts). As to application of proceeds, see s. 34.

(*m*) 45 & 46 Vict. c. 38, s. 35; and see s. 11.

(*n*) S. 2 (5), (6), (7), and ss. 58—62.

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In the case of *Woodhouse* v. *Walker* (*o*), damages were obtained by the devisee in fee of premises for their non-repair against the executor of the devisee for life of the same, on the ground of Permissive Waste, the will expressly providing that such tenant for life should keep them in repair. The facts are shortly stated in the judgment of the Court, which contains all the learning upon the subject, and was delivered by Lush, J.:—

"The action is brought by the reversioner against the executor of a tenant for life, for Permissive Waste by the non-repair of some houses which had been devised to the wife of the testator for life with remainder to the plaintiff in fee.

"The devise was to the wife for her separate use during her life, 'she keeping the houses in repair.' She entered into possession on the death of her husband, and enjoyed the property for several years, but neglected to keep the houses in repair, and after her death the plaintiff entered and did the necessary repairs. This action is brought to recover out of her personal estate the expenses he has so incurred. It is remarkable that no direct authority is to be found for a case which must, we should suppose, have frequently occurred, and that we have to go back to first principles in order to find a solution of the question raised.

"Before the Statutes of Marlbridge (*p*) and of Gloucester (*q*), an action for Waste lay against a tenant in dower and tenant by the curtesy; but none against a tenant for life or years. The reason was, as stated by Coke, in 2 Inst. 300, 'for that the law created their estates and interests, therefore the law gave against them a remedy: but tenant for life or years came in by demise and lease of the owner of the land, &c., and therefore he might in his demise have provided against the doing of Waste by his lessee, and if he did not, it was his negligence and default.'

"Here it is plainly implied that, where the grantor in his grant provides against the doing of Waste, the grantee will be liable for Waste in like manner as a tenant in dower or by curtesy was liable, and this is in perfect accordance with legal principle as expressed by the maxims, '*Qui sentit commodum, sentire debet et onus; et transit terra cum onere*' (*r*). The first of these maxims has a very wide application in our law. See Broom's Maxims.

"The Statute of Marlbridge, c. 23, extended the common law liability by ordaining that 'fermors during their term shall not make Waste, sale, nor exile of house, woods, or men, nor of anything belonging to the tenements that they have to ferm without special licence had by writing of covenant making mention that they may do it, which if they do and thereof be convict, they shall yield full damage, and shall be punished by amerciament grievously.'

"The term 'fermors' here, says Coke (*s*), 'comprehended all who held by lease for life or lives, or for years by deed or without deed; and

(*o*) *Woodhouse* v. *Walker*, 5 Q. B. D. 404.

(*p*) 52 Hen. III.

(*q*) 6 Edw. I. c. 5

(*r*) Co. Litt. 231*a*, and see *per* Holroyd, J., in *Burnett* v. *Lynch*, 5 B. & C. 607.

(*s*) 2 Inst. 145.

the words "do or make Waste" in legal understanding in this place (as well as in the Statute of Gloucester) include as well Permissive Waste, which is Waste by reason of omission or not doing, as for want of reparation, as Waste by reason of commission, as to cut down timber trees or prostrate houses and the like; for he that suffereth a house to decay which he ought to repair doth the Waste.'

"The 'special licence' mentioned in the Statute of Marlbridge is commonly expressed by the well-known phrase 'without impeachment of Waste' (*t*).

"The Statute of Gloucester gives, as a more stringent remedy, a writ of Waste, under which the tenant was liable to forfeiture of the thing wasted and treble damages.

"The right of action against a tenant for life belongs to the owner in fee of the immediate reversion.

"In course of time an action on the case founded on the Statute of Westminster 2, came to be substituted for the writ of Waste, as being a more simple and practical remedy, and the writ of Waste having fallen into disuse was ultimately abolished by 3 & 4 Wm. IV. c. 27, s. 36. But the rights and liabilities of the parties remained as before, the remedy only being changed (*u*). It is not necessary in this case to enter into the question whether an action on the case for Permissive Waste can be maintained against a tenant for life or years, upon whom no express duty to repair is imposed by the instrument which creates the estate. The modern authorities, or rather the dicta upon this point, appear to be strangely in conflict with the ancient reading of the statutes (*x*).

"We think it must be held upon the principle before mentioned, that in this case the tenant for life was liable at common law, and that the plaintiff as immediate reversioner had a right of action, and probably might have obtained an injunction against her for the Permitted Waste, if he had made such an application in her lifetime. The right of action which at common law would have died with the person is continued by 3 & 4 Wm. IV. c. 42, s. 2, against the executor (*y*), 'so as such injury shall have been committed within six calendar months before such person's death, and so as such action shall be brought within six calendar months after such executor (*z*) shall have taken upon himself the administration of the estate and effects of such person.' The wrong of not repairing was a continuing wrong, giving a cause of action *de die in diem* up to the day of the death of the tenant for life, and the action was brought within six months after the death. The plaintiff, therefore, is entitled to recover by virtue of this statute."

In the case just cited, as has been noticed above, the tenant for life was by the express words of the will bound to keep the property in repair; and it has been recently held that damages cannot

(*t*) *Post*, p. 44.

(*u*) *Bacon* v. *Smith*, 1 Q. B. 345.

(*x*) See notes to *Green* v. *Cole*, 2 Wms. Saund. 251.

(*y*) "Or administrator."

(*z*) *I.e.*, the date of the probate or letters of administration, in the absence of evidence that the executor or administrator took upon himself the administration of the estate before that date. See *In re Williams*, W. N. 1884, 242.

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be recovered for mere permissive waste against the estate of a tenant for life upon whom no express duty to repair is cast by the instrument creating his estate (*a*).

Remedy.

Forfeiture of the estate, when incurred by the commission of an act of waste, could formerly be enforced by a process called a "writ of waste"—an action brought by the reversioner or remainderman against the tenant in possession. A statute, however, of Wm. IV. (*b*), in abolishing a variety of old writs, includes the "writ of waste" under the series; and the remedy of the reversioner or remainderman is now by action either for damages for wrong done, or for an injunction to prevent it.

c. Equitable waste.

Without impeachment of waste.

If the tenant for life is made dispunishable for Waste, that is, if his estate is as it is termed "without impeachment of Waste," he has a legal right (*c*) to cut down timber and open mines. But a Court of Equity will not permit an unconscientious use to be made of a legal power, and would therefore restrain him from pulling down or defacing the family mansion, cutting down timber planted or left standing for ornament or shelter (*d*), or doing other acts of spoliation; which are therefore called Equitable Waste. Now it is provided by the Judicature Act, 1873 (*e*):—

> S. 25, § 3. "An estate for life without impeachment of Waste shall not confer or be deemed to have conferred upon the tenant for life any legal right to commit Waste of the description known as Equitable Waste, unless an intention to confer such right shall expressly appear by the instrument creating such estate."

The question recently arose, where a tenant for life unimpeachable for Waste properly cut ornamental timber, whether he was entitled to the proceeds, and it was decided in the affirmative; the whole doctrine of Equitable Waste was considered by Jessel, M.R. (*f*), in the following judgment:—

"An equitable tenant for life unimpeachable for Waste cut ornamental timber, and he alleged that he cut it, not only properly, but beneficially for the ornamental timber which remained; and accordingly an inquiry

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(*a*) *Re Cartwright, Avis* v. *Newman*, 41 Ch. D. 532 (Kay, J.)

(*b*) 3 & 4 Wm. IV. c. 27, s. 36. See *supra*, p. 43.

(*c*) See *Downshire* v. *Sandys*, 6 Ves. 107; and *Wombwell* v. *Belasyse*, *ib.* 110*c*, note.

(*d*) *Ib.* 110*a*. See notes to *Garth* v. *Cotton*, 1 White and Tudor, L. C. Eq. 806.

(*e*) 36 & 37 Vict. c. 66, s. 25, § 3; see also § 11.

(*f*) *Baker* v. *Sebright*, 13 Ch. D. 183. See also *Lowndes* v. *Norton*, 6 Ch. D. 139.

was directed in this form—(His Lordship read it, and continued):—I need not trouble myself about the last part of the inquiry, because the first part of it has been answered in favour of the tenant for life; that is, in effect, that the trees which he did cut injured or impeded the growth of other trees which were of essential importance for ornament or shelter; in other words, he did that which the Court directed to be done in the cases of *Lushington* v. *Boldero* (*g*) and *Ford* v. *Tynte* (*h*). It seems that the trees cut were of considerable value, and of a value very much in excess of the cost of cutting; that is admitted; and, consequently, there was a considerable sum arising from the proceeds of the sale of the timber cut which went into the pocket of the tenant for life.

"The question I have now to decide on further consideration is, whether the equitable tenant for life unimpeachable for Waste is entitled to retain the proceeds of the timber so cut for his own use. If he is not, a second question arises which otherwise it is not necessary to discuss.

"The point, as I said before, does not appear to have been directly decided; but from the cases I am about to refer to, it seems to have been indirectly decided or assumed in favour of the tenant for life; and in deciding it, apparently for the first time, I have no hesitation in saying that, looking at the principles which have been laid down by the Court of Chancery as, so to say, the ground of its interference with the tenant for life in respect of what is commonly called 'ornamental timber,' that is, timber planted for ornament or shelter, it is impossible to hold that this tenant for life ought to be interfered with at all; that is to say, his rights, such as they would have been had the timber not been ornamental, remain unaffected by what has occurred.

"The way to look at this matter is this: Courts of Equity restrained a legal tenant for life unimpeachable for Waste from committing some kinds of Waste which are called Equitable Waste. Why? Because it was considered that, though he had legal powers, he was not using them fairly —he was abusing them so as to destroy the subject of the settlement. That was the only ground, as it was said. Sometimes he was making an unconscientious use of his powers; and in fact the first case on the subject, the case of Lord Barnard (*i*), who, to spite the remainderman, took off the roof of Raby Castle, was a very striking case of the unconscientious use of those powers.

"It does appear to me that the ground stated for the Court's interference quite represents the true view of the matter. The Court of Equity did interfere by injunction to restrain the act of the tenant for life, because it was an unconscientious use of his powers; and, therefore, unless the Court of Equity would restrain a tenant for life from doing the act, it ought not to deprive him of the proceeds of doing it, if what he was doing was not wrongful. The legal result of his act would follow in the same way as if no such doctrine as Equitable Waste were known; in other words, in the case put, he rightfully cuts the timber; and really it comes to that point. Now, if he rightfully cuts the timber, it must be plain that that cannot be called an unconscientious use of his powers, because he is doing that which not only the Court itself would allow, but by established rule will now direct to be done: and it seems

(*g*) 6 Madd. 149.
(*h*) 2 D. J. & S. 127, 129.
(*i*) 2 Vern. 738.

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to me impossible to say, when he has done that which was necessary, so to speak, in order to preserve the remaining timber for the purpose for which it was planted, that what he has done was improperly done. That does not necessarily refer to decaying timber that may be ornamental, and which the Court may order to be cut on the balance of convenience, since it orders it when the tenant for life is impeachable for waste, in the ordinary course of management, and then the proceeds are invested for the benefit of the estate. It may be prudent to cut timber which is decaying, when to do so is beneficial for all parties, and when the Court has them all before it, although there is no absolute right to cut it, because it is ornamental timber. As we all know, there are oaks and other trees which will decay for centuries and still be ornamental. Therefore what I am saying does not necessarily apply to decaying timber, but it does apply to a case where the timber cut is impeding the growth of what I will call more ornamental timber; there cutting is the right thing to do.

* * * * * * * *

"If the tenant for life has only cut such of the ornamental trees as impeded the growth of the others, and such as were, as between the trees cut and those left standing, the most proper to be cut, how can I say he has acted unconscientiously or improperly? It seems to me I could not have granted an injunction against his doing this if he had shown that what he intended to do was exactly what he has done; and that being so he is entitled to the proceeds."

Powers of Leasing, and of Sale and Exchange.

A further consequence of the limited nature of the ownership of a tenant for life is that, unless expressly empowered by the instrument creating his estate, or by Act of Parliament, he would be unable to grant leases to endure after the expiration of his own estate; and of course he could not alienate the land for any estate to endure after such expiration; so that if, as often happens, the persons entitled to the inheritance in remainder are unascertained or are infants, or otherwise incapable of making an effectual disposition, the fee simple in the land could not be sold or exchanged, however desirable it might be to deal with it. Powers of leasing and of sale and exchange were therefore in most cases expressly conferred by settlements and wills of land (*k*); and such powers have also been supplied or supplemented by various Acts of Parliament which we proceed to notice.

Leases and Sales of Settled Estates Acts.

The Act to facilitate Leases and Sales of Settled Estates (*l*) empowered any tenant for life, under a settlement made after 1st November, 1856, unless expressly forbidden by the settlement (*m*), to grant leases for twenty-one years, except of the principal mansion-house and demesnes thereof, and other lands

(*k*) See *post*, Ch. xi. as to these powers.
(*l*) 19 & 20 Vict. c. 120.
(*m*) S. 32.

usually occupied therewith (*n*). This provision was re-enacted in the Settled Estates Act, 1877 (*o*), by which also larger powers of leasing were given to the Chancery Division of the High Court (*p*), whatever the date of the settlement, than had been given under the previous Acts to the Court of Chancery (*q*). The term "settlement" is defined by the Act to signify any instrument or number of instruments by virtue of which any hereditaments, or any estates or interests therein, stand limited to or in trust for any persons by way of succession (*r*). Further, by the Act of 1856 (*s*), power was given to the Court of Chancery even to authorise a sale of the whole or part of any settled estates, and this provision also was re-enacted by the Settled Estates Act, 1877 (*t*); but the Court is not to exercise any of these powers if an express declaration that they shall not be exercised is contained in the settlement (*u*); there must be an express declaration to negative the power of the Court, otherwise, though the settlement contain powers, the Court may proceed under the Act (*x*).

Improvements.

Other Acts of Parliament have also been passed in the present reign, enabling tenants for life to improve the inheritance—*e.g.*, by draining, and to charge the expenses upon the inheritance. The statute 8 & 9 Vict. c. 56, enables them to defray the expenses by way of mortgage; 9 & 10 Vict. c. 101 (*y*) by obtaining an advance of public money. To enable them to make improvements, not only by draining, but also by irrigation, embanking, enclosing, reclaiming, making permanent roads, railways or canals, clearing, erecting buildings, planting for shelter, &c., the Improvement of Land Act, 1864 (*z*), was passed. To the list of improvements in that Act specified was added by the Limited Owners' Residences Act (1870) Amendment Act, 1871 (*a*), the erection, completion, improvement of and addition to a mansion-house, suitable to the

(*n*) This power was exerciseable without application to the Court. The Act contained (s. 2) provisions for other and more extensive leases (including building and mining leases) to be authorized by the Court upon application made to it.

(*o*) 40 & 41 Vict. c. 18, ss. 46, 57.

(*p*) S. 3.

(*q*) S. 4.

(*r*) S. 2.

(*s*) 19 & 20 Vict. c. 120, s. 11.

(*t*) 40 & 41 Vict. c. 18, s. 16.

(*u*) S. 38.

(*x*) The Act 19 & 20 Vict. c. 120, was amended by 21 & 22 Vict. c. 77, 27 & 28 Vict. c. 45, 37 & 38 Vict. c. 33, 39 & 40 Vict. c. 30; all were repealed by the Settled Estates Act, 1877 (40 & 41 Vict. c. 18), s. 58.

(*y*) With the amending Acts, 10 & 11 Vict. c. 11, 11 & 12 Vict. c. 119, 13 & 14 Vict. c. 31, and 19 & 20 Vict. c. 9.

(*z*) 27 & 28 Vict. c. 114, extended by Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 30.

(*a*) 33 & 34 Vict. c. 56, amended by 34 & 35 Vict. c. 84.

estate as a residence for the owner, and by the Limited Owners' Reservoir and Water Supply Further Facilities Act (*b*), powers to make waterworks.

Searches for Improvement charges.

Mr. Dart (*c*) points out the prudence of now searching for drainage and improvement loans on purchases of large estates, or of agricultural land of even moderate acreage. He says:—

"These incumbrances, where they exist, take priority of all other charges; and, in more than one instance in the author's own experience, an omission to make the search would have involved serious consequences. The expediency of making it is not, however, as generally known in the profession as it ought to be."

In Wills or Settlements of Real Estate, it has been usual as we have said to give power to the tenant for life, and then to the trustees during the minority of remaindermen, to lease (*d*); also to the trustees to sell or exchange with the consent of the tenant for life (*e*). Where power of sale or exchange was given, the provisions for working out the same contained in the statute commonly known as Lord Cranworth's Act (*f*), were available, unless expressly negatived, or, so far as they were not varied by the deed, will, or other instruments creating the settlement (*g*). But those provisions were repealed as from after 31st December, 1882, by the Settled Land Act, 1882 (*h*). In future, all express powers of leasing, sale, or exchange, may in general be omitted (*i*).

Settled Land, Act, 1882.

For the Settled Land Act, 1882, which takes effect from and after 31st December, 1882, but is not confined in its operation to future settlements, enables a tenant for life to dispose by sale, lease, or exchange of any part of the settled land, or even of the whole of it; provision being made for securing the purchase-money on a sale, or property taken in exchange, and otherwise for protecting the interests of the remaindermen, and of others entitled under the settlement.

'Tenant for Life."

A tenant for life for the purposes of the Act is defined to be the person who is for the time being under the settlement bene-

(*b*) 40 & 41 Vict. c. 31.

(*c*) V. & P. 523. See also Elph. & Cl. Searches, 104.

(*d*) See forms 2 K. & E. 615 *et seq.*

(*e*) See forms in 2 K. & E. 629 *et seq.*; and as to covenants to be implied in a conveyance under such power, see Conveyancing Act, 1881 (44 & 45 Vict. c. 41), s. 7 (1), (2), and (7); and Wolstenholme & Turner's note to s. 7 (8); see Elph. Introd. 109.

(*f*) 23 & 24 Vict. c. 145, pts. i. & iv.

(*g*) S. 32.

(*h*) 45 & 46 Vict. c. 38, ss. 64 and 1.

(*i*) See some exceptional cases in which they ought to be inserted, 2 K. & E., 565 note, 797 note. See the forms of express powers, *ib.* 615 *et seq.*

ficially entitled to possession, or receipt of the rents and profits of settled land for his life; if two or more persons are so entitled, they together constitute the tenant for life: and a person, being tenant for life within the meaning of the Act, is to be deemed to be such notwithstanding that the settled land or his estate or interest in it is incumbered or charged (*k*).

"Trustees of the Settlement."

The "trustees of the settlement" are the persons who are for the time being trustees with power of sale of settled land, or with power of consent to or approval of the exercise of such a power of sale, or, if there are no such trustees, then the persons if any for the time being who are by the settlement declared to be trustees thereof for the purposes of the Act (*l*).

Sales and exchanges under S. L. Acts.

The tenant for life is empowered to sell or exchange the settled land (*m*) from time to time (*n*), and therefore also to contract to sell or exchange it (*o*), according to his own judgment and discretion, without the necessity for the trustees of the settlement taking any steps to initiate and carry through the sale or exchange, or for the estate being put to the expense and delay of proceedings by a petition (*p*) in the Chancery Division under the Settled Estates Act, 1877; a power of sale and of exchange is thus made incident to the estate of the tenant for life. But to prevent abuse of this power, it is provided that the sale or exchange must be at the best price or for the best consideration that can reasonably be obtained (*q*); that the tenant for life must have regard to the interests of all parties entitled under the settlement, and shall in exercising the powers of the Act be deemed to be in the position of a trustee for such parties (*r*); that he shall give notice of his intention to sell or exchange to each of the trustees, and separately to their solicitor, if known; and that at the date of notice there must not be less than two trustees unless a contrary intention is expressed in the settlement (*s*); but such

(*k*) S. L. A., 1882, s. 2 (5), (6), (7), and (10); see also s. 19, as to tenants for life of undivided shares; s. 58 as to tenants in tail, and other persons having limited interests, who are likewise invested with the powers given by the Act to tenants for life; and ss. 59—62 as to Infants, Married Women and Lunatics.

(*l*) S. L. A., 1882, s. 2 (8).

(*m*) *Ib.* ss. 3 and 20.

(*n*) *Ib.* s. 55.

(*o*) *Ib.* s. 31.

(*p*) See *ante*, p. 47.

(*q*) S. L. A., 1882, s. 4 (1). An exception to this requirement has been introduced in the case of sales for dwellings for the working classes, by 53 & 54 Vict. c. 70, s. 74, as amended by the Settled Land Act, 1890 (53 & 54 Vict. c. 69), s. 18.

(*r*) S. L. A., 1882, s. 53; *Re Radnor's Trusts*, 45 Ch. D. 402.

(*s*) *Ib.*, s. 45. If there are no trustees with a present power of sale or otherwise

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notice may be of a general intention to sell (*t*); that the tenant for life shall, on request by a trustee of the settlement, furnish such particulars and information as may reasonably be required from time to time with reference to sales, exchanges, &c., effected, or in progress, or immediately intended (*u*); that if a difference arises between the tenant for life and the trustees, either party may apply to the Court, that is, the Chancery Division of the High Court, the Court of Chancery of the County Palatine of Lancaster, or the County Court, as the case may be (*x*); that the principal mansion-house and the pleasure grounds and park and lands usually occupied therewith are not to be sold without the consent of the trustees or an order of the Court (*y*); that the purchase-money in case of sale shall be paid either to the trustees or into Court, at the option of the tenant for life, for investment or application (*z*).

Protection of Purchasers.

A purchaser dealing in good faith with the tenant for life, is to be conclusively taken to have given the best price reasonably obtainable, and to have complied with all the requirements of the Act (*a*).

Application of purchase-moneys.

If the purchase-money is paid to the trustees, the tenant for life is to direct the investment or application, and if he do not, it is in the discretion of the trustees, subject in that case, to any consent required or direction given by the settlement; and the investment must be in the names or under the control of the trustees (*b*); if the money is paid into Court, the investment or other application is to be made by the Court on the application of the tenant for life or of the trustees (*c*); an investment or other application once made cannot be altered during the life of the tenant for life without his consent (*d*). The money may be invested on any securities on which the trustees are authorised by the settlement or by law to invest (*e*). The income of the secu-

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within the definition in s. 2 (8), or in S. L. A., 1890, s. 16, trustees must be appointed under s. 38; *Wheelwright* v. *Walker*, 23 Ch. D. 752.

(*t*) Settled Land Act, 1884 (47 & 48 Vict. c. 18), s. 5 (1).

(*u*) *Ib.*, s. 5 (2).

(*x*) S. L. A., 1882, s. 44, and ss. 46, 47.

(*y*) S. L. A., 1890, s. 10. Where a house is usually occupied as a farm house, or where the site of the house, pleasure ground, park, and lands usually occupied therewith do not together exceed 25 acres, the house is not a principal mansion-house within this section; *ib.* sub-s. (3).

(*z*) S. L. A., 1882, s. 22.

(*a*) *Ib.*, s. 54. And see Conveyancing Act, 1882 (45 & 46 Vict. c. 39), s. 3.

(*b*) S. L. A., 1882, s. 22 (2).

(*c*) S. L. A., 1882, s. 22 (3).

(*d*) *Ib.*, s. 22 (4).

(*e*) *Ib.*, s. 21 (1).

rities is to be applied as the income of the land would have been if not sold (*f*); and the capital money and investments thereof are for the purposes of disposition, transmission and devolution, to be considered as land and are to be held for and go to the same persons successively as the land which has been sold would have been held and have gone under the settlement (*g*). Purchase-money, instead of being invested on securities, may be applied in discharge of incumbrances and charges on settled land not sold and in other specified modes (*h*), including purchase of other land, and improvements authorised by the Act for the benefit of the unsold land (*i*). The Act extended the enumeration of improvements in the Improvement of Land Act, 1864 (*k*); and consolidated into one body, under the style of the Land Commissioners for England, the Commissioners hitherto bearing the three several styles of the Inclosure Commissioners for England and Wales, the Copyhold Commissioners, and the Tithe Commissioners for England and Wales (*l*). It also made provision for securing the due execution and maintenance of the authorised improvements under the control and supervision of the Land Commissioners (*m*). By the Board of Agriculture Act, 1889 (*n*), the powers and duties of the Land Commissioners were transferred to the Board of Agriculture thereby constituted.

Improvements.

Land Commissioners.

Board of Agriculture.

If land is purchased or taken in exchange or on partition, it is to be made subject to the settlement in the manner prescribed (*o*).

Land purchased or taken in exchange.

The tenant for life is empowered to grant leases (*p*), and therefore also to contract to lease (*q*), but subject to the same checks against the abuse of such power as in the case of sale (*r*). He may lease the settled land or any part of it, or any easement, right, or privilege over or in relation to it, for ninety-nine years, in case of building leases, sixty years in case of mining leases, and twenty-one years in any other case (*s*). The best rent

Leases by tenant for life.

(*f*) *Ib.*, s. 22 (6).

(*g*) *Ib.*, s. 22 (5).

(*h*) *Ib.*, s. 21 (ii.)—(xi.).

(*i*) *Ib.*, s. 25. Improvements within these provisions must be distinguished from mere repairs, which must be paid for out of income only; see *Clarke* v. *Thornton*, 35 Ch. D. 307.

(*k*) *Ib.*, s. 30. 27 & 28 Vict. c. 114, s. 9.

(*l*) S. L. A., 1882, s. 48.

(*m*) *Ib.*, ss. 26—30, and 49.

(*n*) 52 & 53 Vict. c. 30.

(*o*) S. L. A., 1882, s. 24 and s. 20.

(*p*) *Ib.*, s. 6.

(*q*) *Ib.*, s. 31.

(*r*) See *ib.*, ss. 15, 44, 45, 53, 54, and Settled Land Act, 1884 (47 & 48 Vict. c. 18), s. 5. See also as to leases not exceeding 21 years, and as to mining leases, S. L. A., 1890 (53 & 54 Vict. c. 69), s. 7.

(*s*) S. L. A., 1882, ss. 6, 12, 20 and 55; and S. L. A., 1890, s. 7.

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reasonably obtainable is to be reserved, regard being had to any fine taken, to money laid out or to be laid out for the benefit of the settled land, and generally to the circumstances of the case (*t*). If a fine is taken, it is to be deemed capital money arising under the Settled Land Act, 1882 (*u*), but it is to be laid out, invested, accumulated and paid by the trustees or the Court, in such manner as to give to the parties interested in the money the like benefit as they might lawfully have had from the lease; and any party interested in the money may apply to the Court (*x*).

In the case of a mining lease, unless a contrary intention is expressed in the settlement, where the tenant for life is impeachable for waste in respect of minerals, three-fourth parts of the rent, and in other cases one-fourth part, must be treated as capital, and set aside (*y*). Full powers are given to the tenant for life for developing the settled land for building (*z*), or mining (*a*). The Court may in certain cases (*b*) authorise the tenant for life to grant building or mining leases for any term or in perpetuity at fee-farm or other rents (*c*), and by the Settled Land Act, 1889 (*d*), building leases or agreements may contain an option for the lessee to purchase the land leased.

Surrender of leases.

A tenant for life is also empowered to accept, with or without consideration, a surrender of any lease of settled land in respect of the whole land leased or any part thereof, with or without an exception of the mines and minerals, and to grant a new lease (*e*).

Where money is required for equality of exchange, or partition, or to discharge an incumbrance on the settled land, the tenant for life may raise the same on mortgage of the settled land (*f*).

(*t*) S. L. A., 1882, s. 7 (2). A "fine" means a lump sum paid as part of the consideration for the lease.

(*u*) Settled Land Act, 1884 (47 & 48 Vict. c. 18), s. 4.

(*x*) S. L. A., 1882, s. 34. This corresponds with the Lands Clauses Consolidation Act, 1845 (8 Vict. c. 18), s. 74; and the Settled Estates Act, 1877 (40 & 41 Vict. c. 18), s. 37. See *In re Wilkes' Estate*, 16 Ch. D. 597.

(*y*) S. L. A., 1882, s. 11. See *Re Ridge, Hellard* v. *Moody*, 31 Ch. D. 504.

(*z*) S. L. A., 1882, ss. 8, 10, 13, and 16.

(*a*) *Ib.*, ss. 9, 10, 13, 17.

(*b*) *Ib.*, s. 10.

(*c*) See *post*, Ch. XII.

(*d*) 52 & 53 Vict. c. 36.

(*e*) S. L. A., 1882, s. 13. For old law as to surrender and grant of new leases, and as to concurrent leases, see Sugden on Powers, 777 *et seq.*; and Platt on Leases, 447 *et seq.* An express surrender must be by deed (29 Car. II., c. iii. s. 3; 8 & 9 Vict. c. 106, s. 3); but the acceptance of a new lease by a tenant under a current lease (*Ive's Case*, 5 Rep. 11*b*) or even the grant of a new lease, with his assent, to a stranger (*Davison* v. *Gent*, 1 H. & N. 744, *McDonnell* v. *Pope*, 9 Hare, 706) operates at law as a surrender of the original lease. See 1 K. & E. 926, note.

(*f*) S. L. A., 1882, s. 18; S. L. A., 1890, s. 11. See s. 45. The S. L. A., 1884, s. 5, does not apply to a mortgage, and therefore notice of intention to make the

Protection of settled property.

The Act further provides that the Court may sanction any proceeding for the protection of settled land, or for recovery of land alleged to be subject to a settlement, and may direct payment of the costs out of property subject to the settlement (*g*).

Powers under Act cannot be released.

The powers of a tenant for life under the Act cannot be assigned or released, voluntarily or involuntarily; and a contract by a tenant for life not to exercise any of his powers under the Act is void (*h*), and any prohibition of the exercise of his powers is ineffectual (*i*); and, notwithstanding anything in the settlement, the exercise by the tenant for life of any power under the Act shall not occasion a forfeiture (*k*). The powers given by the settlement are not taken away or abridged by the Act, and the powers given by the Act are cumulative; but in case of conflict between the provisions of a settlement and those of the Act, the latter are to prevail; and notwithstanding anything in the settlement, the consent of the tenant for life is made necessary to the exercise by the trustees of the settlement or other person of any power (*l*) conferred by the settlement exerciseable for any purpose provided for in the Act (*m*) and nothing in the Act is to prevent a settlor from conferring, on the tenant for life or the trustees, powers additional to or larger than those conferred by the Act (*n*).

Conflict of powers.

Heirlooms (*o*).

Under the Settled Estates Acts, no power was given for the sale of chattels, as pictures, tapestries, plate, &c., strictly settled as heirlooms to go along with the estate. Unless where (the settlement being by will) debts of the testator remained unpaid, the Court, however beneficial a sale of such chattels might be for all parties interested, could do no more than authorise application

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specific mortgage must be given to the trustees (*In re Ray's Settled Estates*, 25 Ch. D. 464).

(*g*) S. L. A., 1882, s. 36, in substitution for s. 17 of the Settled Estates Act, 1877 (40 & 41 Vict. c. 18). For instances in which this section has been relied on, see *Re Earl of Aylesford's Settled Estates*, 32 Ch. D. 162; *Re Jones*, 31 W. R. 399; *Stanford* v. *Roberts*, 52 L. J. Ch. 50.

(*h*) S. L. A., 1882, s. 50.

(*i*) *Ib.*, s. 51. See *Re Hazle's S. E.*, 29 Ch. D. 78; *Re Paget's S. E.*, 30 Ch. D. 161. But though ineffectual to prevent a sale by the tenant for life, a forfeiture clause may operate if no sale be made; see *Re Haynes*, 37 Ch. D. 306.

(*k*) *Ib.*, s. 52.

(*l*) Distinguish *powers* from the *trusts* dealt with in S. L. A., 1882, s. 63; *post*, p. 77.

(*m*) *Ib.*, s. 56 (2), which provides for the determination by the Court of any question or doubt arising as to any matter within the section. By the Settled Land Act, 1884 (47 & 48 Vict. c. 18), s. 6 (2), when several persons together constitute the tenant for life, the consent of one is to be sufficient.

(*n*) S. L. A., 1882, s. 57.

(*o*) See *ante*, p. 11.

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to Parliament for an Act (*p*). Now, however, by the Settled Land Act, 1882 (*q*), power to sell such chattels is given to the tenant for life, but not without an order of the Court.

Infants. Married women. Lunatics.

Special provision is made by the Settled Land Act, 1882 (*r*), to meet the cases of the tenant for life being one of the classes of persons commonly spoken of as "under disability"—that is to say, Infants, Married Women, and Lunatics. If an Infant be tenant for life, his powers are to be exercised by the trustees of the settlement, or, if there are none, under the direction of the Court (*s*); if a Married Woman be tenant for life, the powers may be exercised by her alone, if she is entitled to the land for her separate use, and if not, by herself and her husband together (*t*); and if a Lunatic be tenant for life, the powers may be exercised by the Committee of his estate under an order of the Lord Chancellor or other person entrusted with the care of lunatics (*u*).

Conveyance by tenant for life to give title for benefit of creditors.

We may here notice an Act passed for the benefit of creditors, where a sale or mortgage of the lands of a testator is requisite for payment of his debts, and he has left them in settlement. The statute 11 Geo. IV. & 1 Will. IV., c. 47 (*x*), enabled the tenant for life under the direction of the Court of Chancery to convey to the purchaser or mortgagee.

Curtesy. Dower. Tenant in tail after possibility of issue extinct.

We have described the class of estates more generally known under the expression of estates for life, and their leading incidents. As pointed out, however, in the definition above given of such an estate, there are interests which in law are treated as falling under the description of an estate for life, because they are capable of being held for the life of the tenant, though in some cases liable to earlier determination (*y*). Such, for example, are the interests of a husband in the estate of his wife, called "an estate by the curtesy of England," the dower of a wife in the property of her

(*p*) *D'Eyncourt* v. *Gregory*, 3 Ch. D. 635, and see *Fane* v. *Fane*, 2 Ch. D. 711.

(*q*) 45 & 46 Vict. c. 38, s. 37. See, for instances, *Re Duke of Marlborough's Settlement*, 32 Ch. D. 1; *Re Houghton Estate*, 30 Ch. D. 102; *Re Beaumont*, 58 L. T. 916; *Re Radnor*, 45 Ch. D. 402.

(*r*) S. L. A., 1882, ss. 60—62.

(*s*) *Ib.*, s. 60.

(*t*) S. L. A., 1882, s. 61 See *post*, p. 123.

(*u*) S. L. A., 1882, s. 62. See the Lunacy Act, 1890 (53 Vict. c. 5), s. 108.

(*x*) S. 12 explained and extended by 2 & 3 Vict. c. 60, and 11 & 12 Vict. c. 87. See Seton on Decrees, 4th ed., 537.

(*y*) *Ex. gr.*, Dower in gavelkind lands.

husband, and the estate of a tenant in tail after possibility of issue extinct (*z*). These, however, though falling, for some purposes, within the class of estates for life, are each of a distinct and peculiar nature, and will be best treated of under their own separate heads; therefore, the consideration of them is deferred to future chapters.

(*z*) See Settled Estates Act, 1877 (40 & 41 Vict. c. 18), s. 2; and Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 58 (vii.) and (viii.). As to an estate tail after possibility, &c., see *post*, p. 58.

CHAPTER III.

ESTATES TAIL.

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I. Estates tail —what.

An Estate Tail, or as it is sometimes called, an "entail" (*a*), derives its title from the French word *tailler* (to cut or abridge), from the restricted character which the Statute *De Donis* (as will presently appear) imposed upon estates of inheritance granted to a man and "the heirs of his body," or a particular class of heirs of his body.

While an estate for life is limited in its duration to the life of the original grantee himself—*i.e.*, the person to whom the estate has been granted, as opposed to the grantor—or, in the case of an estate *pur autre vie*, to the life or lives for which according to the grant it is holden, an Estate Tail involves a succession of owners in a course of descent; but it descends only to the heirs who issue from the body of the original donee (*b*), or person to whom the estate was originally granted, and, when such heirs are extinct, the estate tail ceases. The descent of an estate tail therefore differs in this respect from the descent of an estate in fee simple, which descends to the heirs general.

"Heirs general" are either lineal, *i.e.*, in the direct ascending or descending line, or collateral, *i.e.*, descending from some common ancestor. For example, the father or son of the *propositus* (*i.e.*, the person whose heir is to be ascertained) may

(*a*) The word "entail" is not a technical legal term. It is sometimes popularly used to denote an estate tail, but more generally to denote a settlement on A. for life with remainders over in tail, or for life and in tail. Such a settlement is called a "strict settlement" by lawyers. The author constantly used the word "entail" for "estate tail"; but the editors consider it better to employ the phrase "estate tail" in order to avoid all ambiguity.

As to estates tail, see Co. Litt. 18*b* *et seq.*: Challis, R. P. 230.

Mr. Challis (R. P. 43) considers "fee tail" to be the more ancient and proper designation of an estate tail. It is the term used in the Statute of Westminster II. (13 Edw. 1, c. 46), and in Littleton, s. 18. See as to its origin 1 Cruise Dig. 70, § 12.

(*b*) "Donee" is a term properly used as signifying the person to whom an estate tail is granted, the proper word to express the creation of an estate tail being "Gift" (*Donatio*); 4 Cruise Dig. 51 (s. 33).

be his lineal heir, while his uncle or nephew may be his collateral heir. The peculiarity of the descent of an estate tail is that only heirs in the direct descending line can take (c).

General: special.

The gift or grant of an estate tail may be "general," *viz.*, to A. and the heirs of his body, or it may be "special." A gift to A. and the heirs of his body, is general, and only restricts the descent to heirs issuing from himself as the parent stock of the inheritance and no farther. But the restriction may be not only to heirs sprung from himself, but to heirs of one sex; or it may be to heirs begotten upon a particular woman, or by a particular man; and such limitations create an estate tail special.

In each instance, however, (only within the class prescribed by the grant) the course of devolution is consistent with the ordinary descent prevailing in the kingdom, as regulated by common law or by local custom, except so far as such law or custom is affected by the Act for the amendment of the Law of Inheritance (d) in respect to persons dying on or after 1st January, 1834. This course of descent is the subject of a later chapter (e). Thus, wherever no peculiar custom of descent, such as that of Gavelkind or that of Borough-English, prevails, in the case of a gift to A. and the heirs of his body, the descent falls on the eldest son, to the exclusion of all others; while in a Gavelkind locality the estate goes among all the sons, and in a Borough-English one to the youngest son (f). The same result would ensue in the instance of the grant being restricted to heirs male of the body or to heirs female of the body. Whoever is the heir of that particular designation, and traced through that particular channel of succession, is the person on whom the inheritance devolves; and this equally applies where the words of procreation refer to a particular parent, as in the case of a gift to heirs begotten of a particular woman, or by a particular man.

Tail male, female—special.

When restricted to the heirs of one sex only, the limitation is said to be in "tail male" or "tail female," according to the sex—as, an estate to A. and the heirs male of his body, or one to B. and the heirs female of his body.

(c) There are some very few cases in which the descent is traced not from the original donee, but from a deceased person. This occurs where the gift is to "A. and the heirs of the body of B.," a deceased person, and A. happens to be the heir of the body of B. See Elph. N. & C. Interp. 237, 238.

(d) 3 & 4 Wm. IV. c. 106, amended by 22 & 23 Vict. c. 35, ss. 19, 20.

(e) See *post*, Ch. V., p. 135.

(f) Bro. Ab. pl. 62.

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A gift to the issue of some specified parental stock—as to A. and B., husband and wife, and the heirs of their two bodies, or to the heirs of the body of A. begotten of B., creates an estate in tail "special." Of course, this too might have the additional restriction of either a male or female line of descent.

The form, then, of the limitation prescribes the course of devolution. It should be added that, in the instance of an estate in tail male, females cannot inherit; nor, in that of one in tail female, can males. Estates in tail female never occur in practice.

Duration.

Whatever the classification under which the entail may fall, the estate tail will, if left to itself, last so long as there exists issue of the prescribed character; so long as there is, as it were, a stream flowing from the fountain, and, on this failing, the estate "reverts" to the original donor, or his heir, or "goes over" in the first instance to the next prescribed line of succession. But this estate may be "barred," *i.e.*, may be so dealt with as to become expanded into a larger estate, so as both to get rid of the restricted character of the course of descent, and to extinguish the remainders over and the reverter to the donor. At the present day, under the Fines and Recoveries Act (*f*), generally speaking (*g*) every tenant in tail can, by deed duly enrolled, convert his estate into an absolute estate in fee simple; but, so long as the original estate remains, it is subject to the restrictions above pointed out.

Tenants in tail after possibility of issue extinct.

Where the limitation is in tail special, as to A. and the heirs of his body begotten by him on a particular wife, should the wife die leaving no issue, the husband is termed "tenant in tail after possibility of issue extinct" (*h*), he cannot bar the entail (*hh*), and his estate is treated under the Settled Estates Act, 1877, and the Settled Land Act, 1882 (*i*), as a life estate; but he cannot be punished for waste, because he once had the inheritance. In cases other than tail special, notwithstanding the improbability arising from old age, the law (*j*) considers the possibility of issue to

(*f*) 3 & 4 Wm. IV. c. 74, ss. 15, 41.

(*g*) See *post*, p. 69.

(*h*) Co. Litt. 27*b* *et seq.*; Challis, R. P. 234.

(*hh*) 3 & 4 Wm. IV. c. 74, s. 18.

(*i*) 40 & 41 Vict. c. 18, s. 2, and 45 & 46 Vict. c. 38, s. 58 (vii.), *ante*, p. 48.

(*j*) Co. Litt. 28*a*. In the *Banbury Peerage Case* (in 1813) several instances were cited of men above eighty being known to have had children. The same presumption is not always in equity held to arise in regard to women. For instance where a spinster, of the age of nearly 54, was entitled under her father's will to a share in his residuary estate absolutely if she had no children, but, in case of having a child or children, only for her life with

exist, and the tenancy remains of its original character. This point, however, is practically material only in reference to the power of barring the entail just above adverted to (*k*).

Freehold.

As an estate for life amounts to a freehold, estates tail being larger than estates for life are also estates of freehold.

Words of inheritance and procreation.

Except in wills, where technical language is not required, words indicative both of inheritance and procreation, have until recently been necessary to create an estate tail. Thus, in a deed, an estate tail, or any greater estate than one for life, would not be created under such words as "to A. and his issue," or "to A. and his offspring or children" (*l*). To create an estate tail by deed, there must have been a marking out or "limitation" of the estate, not only (as in the creation of an estate in fee simple) to the heirs, but also to the particular heirs, as to A. and the heirs of his body; that is, there must have been words of inheritance and of procreation (*m*). In a will, a devise to a person and "his issue," *primâ facie*, confers on him an estate tail (*n*), and a devise to him and his "heirs male" will confer on him an estate in tail male, though there be no words of procreation (*o*). There is a well-known rule as to wills, known as the rule in *Wild's Case* (*p*), that where there is a devise to a person and his "children," and he has no issue at the time of the devise, there, *primâ facie*, the word "children" will be held to be a word of limitation, and such person will take an estate tail.

Rule in *Wild's Case*.

Now, by the Conveyancing and Law of Property Act, 1881, in the case of deeds executed after the 31st December, 1881, it will be sufficient in the limitation of an estate in tail to use the words "in tail" without the words "heirs of the body," and in the limitation of an estate in tail male, or in tail female to use the

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a power of appointment among them; her share was ordered to be paid to her; *In re Widdow's Trusts*, L. R. 11 Eq. 408; and see *In re Millner's Estate*, 14 Eq. 245, where the woman was forty-nine years and nine months old, and she had been married twenty-six years to her husband, and had never had any children. On the other hand the Court refused to treat as past child-bearing a woman aged fifty-four years and six months, who had never had any children, but had only been married three years; *Croxton* v. *May*, 9 Ch. D. 388; and see *In re Warren's Settlement*, 52 L. J. Ch. 928; and cases cited in Dart, V. & P. 391.

(*k*) And see *post*, p. 69.

(*l*) Elph. N. & C. Interp. 232.

(*m*) Elph. N. & C. Interp. 231 *et seq.*

(*n*) *Roddy* v. *Fitzgerald*, 6 H. L. C. 823.

(*o*) Co. Litt. 27*a*; Hawkins on Wills, 173. In a deed, such a limitation would create a fee simple, the word "male" being rejected as repugnant; Elph. N. & C. Interp. 230 (Rule 72).

(*p*) 6 Rep. 17. See Tudor L. C. R. P. 669; Hawkins on Wills, 198; Theobald on Wills, 310; and *Clifford* v. *Koe*, 5 App. Cas. 447.

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words "in tail male" or "in tail female," as the case requires, without the words "heirs male of the body," or "heirs female of the body" (q).

II. Historical development.

Such is the general character of an estate tail as recognised by English law at the present day; but no less from its historical interest than for the better comprehension of the incidents attached to it, particularly that of its being convertible into an estate in fee simple, it will be fitting to go back to an earlier period of the law, and to trace out the transitions by which this species of estate has reached its present development (r).

Conditional fee (s).

The restriction to the heirs of the body of the donee was no doubt originally designed to confine the succession to that particular class of heirs, leaving the donor to resume the possession on its failure. By a somewhat singular and strained construction, however, put in early times by the judges upon grants of this description, a gift to a man and the heirs of his body was held to be a "fee simple conditional," that is, to be in the nature of a gift to him, conditional only on his having issue, and the donor's right of re-entry was held to accrue only on breach of the condition, *i.e.*, in case the donee had no issue. Thus, by the birth of issue the condition was said to be performed, and the estate accordingly to have become a fee simple absolute, but only to the extent of conferring a general power of alienation, subjecting the land to forfeiture for the treason of the donee, and empowering the donee to charge the land with rent, common, or the like. But subject to any alienation, forfeiture, or charge, the original course of descent prevailed, and the land devolved on the issue; and, on their failure, the donor had a right to re-enter (t).

The construction put upon these grants was extremely distasteful to the great landlords, of whom the lands were holden. The creation of a power of alienation on the mere birth of an expectant heir diminished the chance of the reverter of the estate to the lord; while, with every alienation, particularly if it was by way of subinfeudation, the rents and services attached to the original grant became practically matters of more difficult re-

(q) 44 & 45 Vict. c. 41, ss. 51 [1], and 4th Sched. IV.

(r) See the origin of estates tail explained in Digby, R. P. chap. IV. § 3, pp. 178 *et seq.*, and 1 Cruise, Dig. 66 *et seq.*

(s) Co. Litt. 19*a*; Challis, R. P. 208. See a most interesting article by Professor Maitland in 6 L. Q. R. 22.

(t) See the remarks of Mr. Butler in his note (sect. vi., 7) to Co. Litt. 191*a*, as to the nature and incidents of a fee simple conditional at the common law; and see 1 Sand. Us. 210.

covery and enforcement by reason of the change, and possibly often the multiplication, of the ownership. The latter grievance had indeed been partially remedied by the statute of Magna Charta (*u*) which enacted that no freeman should give or sell any more of his land than so as that what remained might be sufficient to answer the services he owed to his lord. But, practically, the enforcement of the services became more difficult by the creation of varied and sometimes complicated forms of ownership; and this remedy in no way affected the diminished chance of resuming possession of the whole of the land on the failure of the issue.

Magna Charta.

By the reign of Edward I., this diminished possibility of estates reverting to them had become so strongly felt by the great barons, that their influence produced as a remedy the statute, which is a very celebrated one in the history of English law, known as the Statute of Westminster the Second, or more commonly, as the Statute De Donis (*w*). Lord Coke says:—

Statute *De Donis* (*v*).

"It is called Westminster the Second because the parliament was holden at Westminster, and hath the name of the Second, because another parliament was formerly holden at Westminster in the third year of the same king's reign, which was called Westminster the First. And albeit many parliaments were after holden at Westminster besides these, yet were they two only, *propter excellentiam*, called the Statutes of Westminster" (*x*).

This statute enacted that from thenceforth the will of the donor should be observed *secundum formam in cartâ doni expressam*, and that the tenements so given (to a man and the heirs of his body, or the heirs male of his body or the like) should, notwithstanding any alienation by the donee, go after his death to his issue if there were any, or, if issue failed, should revert to the donor or his heirs (*y*). This abridgment of the power of alienation—the restriction to descent to the issue, and the reverter to the lord on their failure—was the cutting down adverted to at the opening of the chapter, and which gave to this estate the name of *feodum talliatum* or "fee tail" (*z*).

(*u*) See 2nd Instit. 65.

(*v*) See 2nd Instit. 33, 1.

(*w*) A.D. 1285: 13 Edw. I. c. i.

(*x*) Co. Litt. 19*a*.

(*y*) See the text of the statute set out in Digby, R. P. 182 *et seq.*

(*z*) The name according to Cruise (Dig. vol. i. p. 67) was far older than the Statute *De Donis* and was known in feudal law in early times as that of estates created by limitations similar to those which in England at common law created a fee simple conditional.

"Upon the construction of this Act of Parliament" says Blackstone (*a*), "the judges determined that the donee had no longer a conditional fee simple, which became absolute and at his own disposal the instant any issue was born; but they divided the estate into two parts, leaving in the donee a new kind of particular estate, which they denominated a fee tail, and vesting in the donor the ultimate fee simple of the land, expectant on the failure of issue; which expectant estate is what we now call a reversion. And hence it is that Littleton tells us, that tenant in fee tail is by virtue of the Statute of Westminster the Second."

The statute was, at the time of its enactment, supposed to be a final accomplishment of its object. The result, however, showed that the remedy of one class of grievances only called into existence, and in an opposite direction, another still greater. Blackstone (*b*) says:—

"The establishment of this family law occasioned infinite difficulties and disputes. Children grew disobedient, when they knew they could not be set aside: farmers were ousted of their leases made by tenants in tail; for, if such leases had been valid, then under colour of long leases the issue might have been virtually disinherited; creditors were defrauded of their debts; for, if tenant in tail could have charged his estate with their payment, he might also have defeated his issue, by mortgaging it for as much as it was worth; innumerable latent entails were produced to deprive purchasers of the lands they had fairly bought; of suits in consequence of which our antient books are full: and treasons were encouraged; as estates tail were not liable to forfeiture longer than for the tenant's life. So that they were justly branded as the source of new conventions, and mischiefs unknown to the common law; and almost universally considered as the common grievance of the realm."

Still such was the power of the nobility, that for a period of about 200 years the statute was triumphant (*c*), and the evils thus pointed out had to be endured in passive submission.

At length, however, ecclesiastical subtlety, and a decision of a court of law (pronounced in the reign of Edward IV.), operating on an ecclesiastical invention, provided a remedy called a "common recovery" (*d*), and not only restored the power of alienation (*e*) to the extent to which it had prevailed previously to the Statute De Donis, but gave it a much more extended

(*a*) Vol. ii. 112; and see Coke, Pref. to Rep., part 4, cited in Pollock on the Land Laws, p. 76.

(*b*) Vol. ii. 116. In addition to the authorities cited by Blackstone, see *Sir Anthony Mildmay's Case*, 6 Rep. 40*a*; Bacon's argument in *Chudleigh's Case*, Works, Ed. Spedding, vol. vii. p. 617; *Martin* d. *Tregonwell* v. *Strahan*, 1 Wils. at 73; Piggott on Recoveries, 5.

(*c*) The statement in the text expresses the received opinion, but one of the Editors has advanced reasons for considering this opinion to be erroneous in Law Quarterly Review, vol. vi. p. 280.

(*d*) 2 Bl. 117, 271.

(*e*) See Challis, R. P. 244.

character. In fact, it enabled any tenant in tail, (save only a tenant in tail after possibility of issue extinct), whether his estate was in possession or in remainder (but in the latter case only with the concurrence of the person having the first estate of freehold), not only to destroy the estate tail, that is, the descent on the issue, but the reverter to the lord, in other words, both the estate tail itself and all estates taking effect on its determination; in short, to convert the estate tail into one in fee simple (*f*).

Mortmain.

For some time previously to this, alienation "in mortmain" had been prohibited by statute (*g*). Alienation in mortmain (*in mortuâ manu*) was an alienation of lands or tenements to any corporation (*h*).

"But," says Blackstone, "these purchases have been chiefly made by religious houses, in consequence whereof the lands became perpetually inherent in one dead hand; this hath occasioned the general appellation of mortmain to be applied to such alienations, and the religious houses themselves to be principally considered in forming the Statutes of Mortmain" (*i*).

Recoveries.

For some time the ingenuity of the monks had contrived to defeat the statutes by means of a fictitious action (*k*), brought by the religious house against the tenant in possession, for the recovery of the lands granted in mortmain, under which the right was awarded to the house in the teeth of the statutes. The monks set up a fictitious title to the land; the tenant, acting in collusion with the monastery, made no defence

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(*f*) At common law a recovery suffered by a tenant in tail where the reversion was in the Crown barred his issue but did not bar the Crown. The Act 33 & 34 Hen. VIII. c. 20, rendered a recovery by a tenant in tail void where the land was granted or otherwise provided by the Crown in tail "for service done to the Kings of the Realm," and where at the time of the recovery the reversion or remainder was in the Crown. This statute is discussed very minutely in Co. Litt. 372*b*. See also *Murrey* v. *Eyton*, T. Raym. 260, 319, 338; *Perkins* v. *Sewell*, 4 Burr. 2223; S. C., 1 W. Bl. 654; *Johnson* v. *Derby*, 2 Show. 104; 5 Cruise, Dig. 414 *et seq.* By the effect of the Act for the Abolition of Fines and Recoveries (3 & 4 Will. IV. c. 74, ss. 15 & 18) a tenant in tail can bar the reversion of the Crown in all cases where he can bar his own issue, *i.e.*, in all cases where the issue are not protected by 33 & 34 Hen. VIII. c. 20. See *Abergavenny* v. *Brace*, L. R. 7 Ex. 145.

(*g*) *Magna Charta*, c. 36. See Digby, R. P. 114, where the text of this provision is given. See also the *Statutum de Viris Religiosis*, 7 Ed. I. Stat. 2 c. 13; Digby, R. P. 175.

(*h*) See Digby, R. P. 173; and *post*, p. 85 *et seq.*

(*i*) 2 Bl. 268.

(*k*) 2 Bl. 271; 2nd Instit. 429. "Recovery" means properly any real action in which land was recovered (5 Cruise, Dig. 268; Co. Litt. 154*a*); but it is generally used to denote a fictitious action.

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to the action. Judgment was therefore given for the religious house, which then recovered the land by a sentence of law upon the supposed prior title. The original Statutes of Mortmain were addressed in terms only to gifts and conveyances between the parties, and did not apply to actions. Later statutes, particularly that of Westminster the Second (*l*), had restrained the use of the device as to alienation in mortmain, but the device itself had not been forgotten. In the reign of Edward IV. (*m*) it was again revived, and its application to estates tail was brought before the Courts in a case which, from the name of one of the original actors in it, has been handed down to posterity under the name of *Taltarum's Case* (*n*). The case is said to have been brought into court under the direct encouragement of the King (*o*); who, in the disputes between the houses of York and Lancaster, observing how little effect attainders for treason had on families whose estates were protected by entails (*p*), desired to introduce, through the instrumentality of the courts of law, a means of destroying them.

Taltarum's Case.

The "recovery" operated not only on the estate tail, but on all the remainders expectant on its extinction, and converted the estate into an absolute estate in fee simple, discharged alike of the estate tail itself and of all remainders and of the reversion expectant upon them—*i.e.*, not only were the issue and the donor barred of their rights, but also all other persons to whom estates had been given expectant on the death of the tenant in tail without issue inheritable: for instance, where lands had been given by A. to B. and the heirs of his body, and in default of such issue to C. and the heirs of his body, if B. suffered a recovery, the issue of B. would be barred, the estate "in remainder," as it was called, to C. would be barred, and the reversion of A. and his heirs would be barred (*q*).

The principle on which this was founded was as follows: in the writ (called a "*præcipe quod reddat*," from its initial words) it was alleged that the tenant, *i.e.*, the person in possession, had no legal title to the land, but that the demandant, *i.e.*, the plaintiff,

(*l*) 13 Ed. I. c. 32.

(*m*) A.D. 1473. See 6 L. Q. R. 287.

(*n*) 2 Bl. 117; Challis, R. P. 250, where the effect of the case is stated. It is reported in the Year Book for Mich. Term, 12 Edw. IV. fol. 19*a*.

(*o*) Piggott on Recoveries, 8. But the learned author gives no authority for this statement.

(*p*) Estates tail were not liable to forfeiture longer than for the tenant's life. (2 Bl. 116.)

(*q*) As to "remainders" and "reversions," see *post*, ch. VIII., p. 218.

having originally had the possession, had been wrongfully turned out of it by the party through whom the "tenant," *i.e.*, the defendant holding the land, claimed (*p*). The answer of the defendant was, that the party from whom he derived his title had on the occasion of the original grant warranted the possession to him, and therefore he urged that he should be vouched to warranty, *i.e.*, called upon to defend it. The party thus called upon, termed the "vouchee" (from *vocatio*, "calling"), practically admitted the warranty by suffering judgment to go against him by default. The ultimate judgment of the Court therefore was, that the demandant, then called the "recoveror," should recover the lands against the tenant, then called the "recoveree," and he in turn was to recover lands of equal value as a recompense against the supposed warrantor, which recompense, if actually given, would have gone in substitution for the lands recovered, and been subject accordingly both to the entail of those lands and to all estates in remainder or reversion expectant upon its termination. It is true the recompense which was the supposed support of the judgment was fictitious, but there was a possibility in the contemplation of law of its being made, and there was a judgment of the Court for the recovery; in other words, a judgment awarded the restitution of the lands to the demandant, and this upon the theory of an absolute right in the demandant. The result was that the old estate became extinguished, and a new one was acquired by the judgment, just as if a new grant had been made; and where the recoveror (demandant in the action) was the purchaser of the lands from the tenant, the recovery operated as a conveyance to him of the fee simple (*q*).

"These recoveries," says Blackstone in 1765 (*r*), "however clandestinely begun, are now become by long use and acquiescence a most common assurance of lands; and are looked upon as the legal mode of conveyance, by which tenant in tail may dispose of his lands and tenements; so that no Court will suffer them to be shaken or reflected on, and even Acts of Parliament have by a side-wind countenanced and established them."

Fine (*s*).

The destruction of the estate tail, and the acquisition of power of alienation by the tenant, for an estate which would endure so

(*p*) 2 Bl. 358.

(*q*) For full account, see 2 Bl. 357; and *ib.* Appendix V. p. xvii.; and see the process described in Pollock on the Land Laws, 78 *et seq.*

(*r*) Vol. ii. 117.

(*s*) As to fines, see 5 Cruise, Dig. tit. xxxv.; Challis, R. P. 246.

Chap. III. long as there should exist issue inheritable, might also have been effected by another fictitious process called a "fine," which barred only the issue in tail, but had no effect on the remainders (if any) or the reversion.

A "fine," like a recovery, was an action brought in the name of a friendly party to whom the land was to be conveyed or assured, against the person who was to convey it; and in form it was an action on an alleged covenant by the defendant (called the "*deforciant*" or "*conusor*") to convey the lands to the plaintiff (called the "*complainant*" or "*conusee*"). It was called a Fine from the Latin word "*finis*," or end; because, it was said, it put an end, not only to the suit then commenced, but to all other controversies concerning the same matter. It was a process known to the law more anciently than a recovery, and, indeed, as Blackstone (*t*) tells us, was of equal antiquity with the first rudiments of the law, though its application to the destroying of an entail was somewhat later than that of the recovery. The recovery proceeded on the principle of carrying the action through all its stages to a final judgment. The principle of the fine was compromise, or acknowledgment of the right claimed, under a sanction given to it by the Court. The whole basis of the proceeding was, that the party against whom the action was brought had covenanted with the plaintiff to convey to him the lands in question, and the purpose of the action was to obtain the land or recompense for the breach of the covenant. By the compromise the defendant acknowledged the right of the plaintiff, but, the plaintiff having on bringing his action given pledges to the Court to prosecute the same, it was necessary to obtain the sanction of the Court for the settlement of the action. The leave of the Court to make the matter up converted the arrangement into a judicial one, and this was called the Concord, and was the substantive and effective part of the fine. The Concord was followed by enrolment of the whole proceedings and the making them up into a record; and latterly, the process was completed by proclamations made in open Court, that is, a public announcement of the transaction in open court. The Court was accustomed to hold four sittings in each year, called terms, and the fine was to be proclaimed

(*t*) 2 Bl. 349; and see the forms of the writ and subsequent proceedings, *ibid.* App. IV. p. xiv.

four times in the term in which it was levied, and four times in each of the three succeeding terms (*u*).

In its inception and before proclamations were required, the fine only bound parties to it, and those in privity with them, called "privies"—that is, persons claiming through the parties. In 18 Ed. I. the fine was made operative on strangers, and bound them, if they failed to put in their claim within the time allowed by law; originally this was a year and a day only from the time of levying the fine (*x*). Proclamations were introduced in 27 Ed. I. (*y*), and shortly afterwards the barring of the right by non-claim was abolished for a time by 34 Ed. III. c. 16, which admitted persons to claim and to falsify a fine at any indefinite distance of time: "whereby," as Sir Edward Coke observed, "great contention arose, and few men were sure of their possessions, till the Parliament held 4 Hen. VII., confirming 1 Rich. III. c. 7, reformed that mischief, and excellently moderated between the latitude given by the statute and the common law." For while the statute restored the doctrine of non-claim, it only barred the right of strangers in case they had not made claim within five years after proclamation made (*z*). It had been expressly provided by the Statute De Donis that a fine levied by the tenant in tail should not bar the issue; but by 32 Hen. VIII. c. 36, it was enacted that when levied with proclamations according to 4 Hen. VII. c. 24, by any person of full age to whom or to whose ancestors lands had been entailed, whether they were in possession, reversion, or remainder, it should be a perpetual bar to them and their heirs claiming by force of such entail (*a*), and the bar was immediate (*b*). But the statute of 32 Hen. VIII. did not extend to bar those either in remainder or reversion; they had still a right of entry or of action on the death of the tenant who had levied the fine, and failure of his issue. Though since the Statute fines were always levied with proclamations, except in some few cases where the proclamations were omitted by accident, yet trouble and expense were often incurred in procuring evidence that they were so levied; it was therefore

(*u*) Reduced to once in each term by 31 Eliz. c. 2. It was the duty of the "chirographer" of fines every term to write out and exhibit a table of fines levied in each county: 2 Bl. 352.

(*x*) See statute 18 Ed. I., quoted 2 Bl. 354; 2nd Instit. 510.

(*y*) *Statutum de Finibus levatis*, 27 Ed. I.; 5 Cruise, Dig. 90. 2nd. Instit. 521.

(*z*) 2nd Instit. 518.

(*a* 2 Bl. 355.

(*b*) Wms. R. P. 67.

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provided by 11 & 12 Vict. c. 70, that all fines theretofore levied in the Court of Common Pleas should be conclusively deemed to have been levied with proclamations (*c*).

Abolition of fines and recoveries.

Both fines and recoveries have now been abolished by the Act for the Abolition of Fines and Recoveries (*d*). In order, however, to a due understanding of that Act, it is necessary to state further that a recovery to be operative always required that the recoveree (*i.e.*, the person against whom the action was brought, or "tenant to the præcipe,") should be actually seised of the freehold (*e*). But a fine could be levied of an interest of a reversionary character. Thus, suppose land to have been settled upon A. for life, with remainder to B. in tail; during the subsistence of A.'s life estate no recovery could have been had, or, as it is technically called, "suffered," by B. unless with the concurrence of A. For a recovery to have been suffered in such case, the tenant for life A. (or any person whom A., having conveyed to him an estate of freehold, had made tenant to the præcipe) must have vouched B. the remainderman in tail, and he in turn must have vouched the "common vouchee" (*f*); but a fine might have been levied by B. notwithstanding the antecedent estate in A., and that fine would have been operative on the estate tail whenever it fell into possession. The recovery converted the estate into an absolute fee, while the fine only converted it into what was called a "base fee," that is, a fee limited to the duration of the prescribed line of heirs to whom the estate tail was limited. On the failure of these, where the process resorted to was a fine only, the limitations of reversionary interests subsequent to the estate tail came into operation (*g*). From the time of the Statute *De Donis* down to the passing of the Act for the Abolition of Fines and Recoveries, fines and recoveries were the usual means adopted for the destruction of estates tail (*h*). The Act, however, which abolished fines and recoveries, provided, in substitution for this costly and

(*c*) See 2 Bl. 352, for description of proceeding by fine, *Sur cognizance de droit come ceo*, &c., which was the usual one.

(*d*) 3 & 4 Wm. IV. c. 74.

(*e*) 2 Bl. 362.

(*f*) So called from being generally thus vouched; he was usually the crier of the Court: 2 Bl. 359, and see 362.

(*g*) In some few cases, not adapted to the consideration of students, estates tail in remainder might be wholly or partially barred by the operation of the warranty contained in the concord of the fine. See Law Quarterly Review, vol. vi. p. 280.

(*h*) As to the method of barring an estate tail wholly or partially by a feoffment and warranty, see Law Quarterly Review, vol. vi. p. 280.

circuitous procedure, a new and simple assurance, in effect (subject only to the exceptions which will be pointed out) empowering all tenants in tail, whether in possession, remainder, contingency, or otherwise, not only to destroy the estate tail, but all estates expectant upon its termination; and either to acquire or to dispose of to others an estate in fee simple absolute, or any less estate, in the lands.

The Act provided (s. 15) that:—

3 & 4 Wm. IV., c. 74, s. 15.

> "After the thirty-first day of December, one thousand eight hundred and thirty-three, every actual tenant in tail, whether in possession, remainder, contingency, or otherwise, shall have full power to dispose of for an estate in fee simple absolute, or for any less estate, the lands entailed, as against all persons claiming the lands entailed by force of any estate tail which shall be vested in or might be claimed by, or which but for some previous act would have been vested in or might have been claimed by, the person making the disposition, at the time of his making the same, and also as against all persons, including the King's most excellent Majesty, his heirs and successors, whose estates are to take effect after the determination or in defeasance of any such estate tail; saving always the rights of all persons in respect of estates prior to the estate tail in respect of which such disposition shall be made, and the rights of all other persons, except those against whom such disposition is by this act authorised to be made."

Disposition by deed.

The disposition can be effected by any deed by which the tenant in tail could have made the disposition of his estate if his estate had been "an estate at law in fee simple absolute," enrolled in the Court of Chancery (now in the Central Office of the Supreme Court) within six months from its execution (*i*). The exceptions referred to are estates tail after possibility of issue extinct; estates tail granted by the Crown as the reward of public services, the reversion still remaining in the Crown (*k*); and (*l*) estates tail at the date of the Act subsisting in females in lands of their deceased husbands or given by any of the husband's ancestors, which were called estates tail "*ex provisione viri*," but which, in modern times, had become obsolete (*m*), and for the future were abolished by the same Act (*n*). These excepted

Excepted cases.

(*i*) 3 & 4 Wm. IV. c. 74, ss. 15, 40, 41. And see Rules of the Supreme Court, Ord. LXI. r. 9. Forms of disentailing assurance are given in Davidson's Conc. Prec., pp. 563 *et seq.* : Dav. Prec., vol. iii., and K. & E. vol. i.

(*k*) S. 18, *ante*, p. 63, note (*f*).

(*l*) S. 16.

(*m*) Perhaps this statement is too positive: one of the Editors has met with an estate of this nature in practice.

(*n*) S. 17.

Chap. III. estates tail are excluded from the operation of the Act, and cannot be barred.

Protector of the Settlement

In the case of an estate tail not in actual possession, but in remainder expectant on the determination of some antecedent freehold interest, as, for example, a gift to A. for life, with the remainder to B. in tail, where A. is living, the statute adopts the ancient principle of the recovery, requiring the concurrence of the owner of the antecedent estate to enable a destruction, not of the estate tail itself, but of remainders and reversions expectant upon it. This person it styles the Protector (*nn*); but in lieu of him the settlor may appoint any number of persons *in esse* not exceeding three (*o*). But the tenant in tail in remainder may still, without the Protector's consent (as before the Act he could by levying a fine), bar his issue and create a "base fee," which estate, during the continuance of such issue, will be subject to his disposition, or descend to his heirs as a fee simple. Where the owner of a base fee becomes entitled to the immediate remainder or reversion in fee, as by the person entitled in remainder or reversion releasing his interest to him, the base fee is enlarged into as large an estate as the tenant in tail with the consent of the protector might have created: for the Act provides:—

3 & 4 Wm. IV., c. 74, s. 39.

S. 39. "That if a base fee in any lands, and the remainder or reversion in fee in the same lands, shall at the time of the passing of this Act, or at any time afterwards, be united in the same person, and at any time after the passing of this Act there shall be no intermediate estate between the base fee and the remainder or reversion, then and in such case the base fee shall not merge, but shall be *ipso facto* enlarged into as large an estate as the tenant in tail with the consent of the protector, if any, might have created by any disposition under this Act, if such remainder or reversion had been vested in any other person."

On the purchase, then, of lands from a tenant in tail, in order to the completion of the purchase it is necessary—it being essential to the validity of the deed of conveyance as against the issue in tail, remaindermen, and reversioners—that the deed be enrolled within six calendar months after its execution by the vendor (*p*); and, if so enrolled, it will take effect from the time of execution, except as against persons claiming for valuable consideration under a previously enrolled deed (although subsequently executed) and with-

(*nn*) See s. 22 for the definition of the "Protector."

(*o*) S. 32.

(*p*) 3 & 4 Wm. IV. c. 74, s. 41.

out express notice of the estate created by the previously executed deed (*q*). If there be a protector of the settlement (that is, if the vendor be not tenant in tail in possession) and such protector's consent be given by a separate deed (that is, not by the conveyance itself or "disentailing assurance," as the instrument is usually called), the consent deed must be executed on or before the day on which the assurance is made by the tenant in tail, and must be enrolled at or before the time at which the assurance is enrolled (*r*).

Lunatic.

Where the protector is a lunatic, the Lord Chancellor is substituted for him and can consent as protector under the Act to any tenant in tail in remainder barring the entail (*t*).

A further question has arisen under the Act (*u*), namely, where there are both a trustee and a *cestui que trust* of the estate of freehold in possession, who is the protector of the settlement? Lord St. Leonards, many years ago, gave the opinion that the *cestui que trust*, that is, the person entitled under the settlement to the beneficial enjoyment of the rents and profits, is the owner under the statute, and therefore the protector to consent to barring the entail. That opinion has been acted on by conveyancers for forty-five years, and now, after a fruitless attempt to prove it incorrect, the opinion has received judicial sanction (*x*).

Family settlement.

The principle, both of the old law of the recovery and of the modern statute, in requiring, in the case in which the estate tail is of a reversionary nature, the concurrence of the person in whom the estate of freehold in possession is vested, is in conformity with a habit which has always prevailed among the landowners of England, and which has been regarded as an essential element to the existence of a landed aristocracy (*y*). Almost entirely among the noble, and to a great extent among the higher classes gene-

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(*q*) Ss. 38, 74.

(*r*) Ss. 42—46.

(*t*) Ss. 33, 48.

(*u*) S. 22.

(*x*) *In re Dudson's Contract*, 8 Ch. D. 628; *Re Ainslie*, 33 W. R. 179. See also *Clarke* v. *Chamberlin*, 16 Ch. D. 176, in which trustees appointed protectors having died, the tenant for life, and not the new trustees, was held to be protector.

(*y*) This statement must be taken with considerable qualification. Before the time when the modern form of strict settlement came into use, *i.e.*, about the middle of the 17th century, the common manner of settling land was to give an estate tail to the first taker, so that ever since the invention of common recoveries he had an unrestricted power of alienation *inter vivos*. See as to the early history of settlements, Butler's note to Co. Litt. 290*b*, n. I. (V.), 1 Jurid. Soc. Pap. 45; and Pollock on the Land Laws, Appendix, Note F.

Chap. III. rally of England possessed of landed estates, with the view of preserving the succession so far as practicable in the male line, and in its eldest branch, the course of family settlement is (subject to a provision for a wife, younger sons and the daughters), to limit the estate in the first instance to the male stock of the family for his life, with remainder after his death to his eldest son in tail, with remainders to the second and other sons in tail in succession, with other family remainders over. Either on the attainment of majority by the eldest son or on his marriage, the estate is resettled, reserving to the father his original estate for life, abridging the estate tail of the son by converting it into an estate for life expectant on the death of the father, with probably some rent-charge by way of intermediate allowance, and then on his own (that is the son's) death (subject to the like provision for his wife and younger sons and his daughters as took place in the case of his father) limiting the estate again upon his eldest son in tail with remainder to his second and other sons in tail in succession, in like manner as had been done on the occasion of the original settlement. In this course of settlement the father, for the time being in possession as tenant for life, is the protector of the settlement; and accordingly, without his concurrence, not only can no settlement be made, but the eldest son or whoever else may be the tenant in tail in remainder, has during his father's lifetime no power of dealing with any greater extent of ownership than his own estate tail, and cannot bar the remainders expectant on its termination. Under the old law this result was accomplished by the principle which required the concurrence of the owner of the first estate of freehold in possession as essential to the validity of the recovery; and the office of the protector under the statute carries out that principle (z).

The great object in this course of settlement is to tie up the estate for the longest period consistent with the rules of law, namely, by giving estates to the unborn children of living persons. In an ordinary family settlement this secures an inalienability at all events for the life of the first taker, the father, and until the attainment of majority of the eldest son: when, by the process of the re-settlement, fetters are again thrown upon the alienation and tie the estate up for the lives of the father and the son, and up to the majority of the grandson.

(z) See Form 3 Dav. Prec. 285.

An estate tail can now be barred only under the provisions of the statute, and in conformity with the formalities it prescribes. It cannot be barred either by contract or by testamentary disposition (*a*).

Settled Land Act, 1882.

Sale—exchange.

Tenants in tail in possession and persons entitled in possession to base fees are given the powers of a tenant for life under the Settled Land Act, 1882 (*b*), and therefore can in the same way sell or exchange the property the subject of the entail, the entail being transferred to the purchase money or the land taken in exchange (*c*). Less ample powers of sale had been conferred by the Leases and Sales of Settled Estates Act, 1856 (*d*), and the Amending Acts, all of which were repealed and replaced by the Settled Estates Act, 1877 (*e*).

III. Incidents. Committing waste.

There were pointed out in the last chapter the restrictions which exist in the case of a tenant for life as to cutting down timber and committing other acts of waste. These do not apply to the tenant in tail, who may commit waste at his pleasure (*f*). In fact, this is but consistent with the nature of an ownership which places the destruction of the interests of those claiming either as issue in tail or as remaindermen at his mercy.

Leases.

Prior to the Act for the abolition of fines and recoveries a tenant in tail in possession could, under the enabling statute of Henry VIII. (*g*), make leases valid against his issue only, but not against the remainderman or reversioner; but by the former Act he is empowered to make a lease for twenty-one years to commence from the date thereof, or from any time not exceeding twelve calendar months from such date, at a rack rent, that is, a rent of the full value of the tenement (*h*), or not less than five-sixth parts of it, without the necessity of enrolling the deed (*i*).

The statute of Henry VIII. (*k*) was repealed by the Settled Estates Act of 1856 (*l*), and the same power of leasing was given to the tenant in tail in possession (*m*), except where the entail

(*a*) 3 & 4 Wm. IV. c. 74, s. 40. See *Bankes* v. *Small*, 36 Ch. D. 716. So a declaration of trust by tenant in tail is inoperative to bar the estate tail; *Green* v. *Paterson*, 32 Ch. D. 95.

(*b*) 45 & 46 Vict. c. 38, s. 58 (i.).

(*c*) See *ante*, chap. ii. p. 49 *et seq.*

(*d*) 19 & 20 Vict. c. 120; see s. 15.

(*e*) 40 & 41 Vict. c. 18; see ss. 23, 24, and *ante*, chap. ii. p. 47.

(*f*) 2 Bl. 115.

(*g*) 32 Hen. VIII. c. 28.

(*h*) As to rack-rent, see 2 Bl. 43; Strode, Jud. Dict. 644. There is a definition of rack-rent in the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 4.

(*i*) 3 & 4 Wm. IV. c. 74, s. 41.

(*k*) 32 Hen. VIII. c. 28.

(*l*) 19 & 20 Vict. c. 120, s. 35.

(*m*) *Ib.*, s. 32.

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was created by Act of Parliament (*n*), as to tenants for life (*o*). This was continued by the Settled Estates Act, 1877 (*p*), which repealed and replaced the Act of 1856, and amending Acts. And now, as in the case of sale and exchange, ampler powers have been conferred by the Settled Land Act, 1882 (*q*), which provides that a tenant in tail in possession shall have the powers of a tenant for life under that Act, and also that a person entitled in possession to a base fee, although the reversion is in the Crown, shall have the like powers. Therefore in future, as before observed with regard to estates for life, provisions in respect of leasing, as well as of sale and exchange by tenants in tail, may in general be omitted in the instrument of settlement (*r*).

Debts.

Formerly an estate tail, when suffered to descend, was not liable to the debts of the deceased tenant in tail, except in respect of debts due to the Crown (*s*); for, though a tenant in tail has a larger estate than a tenant for life, as he has the inheritance in him, and may, when he pleases, turn it into a fee, yet, if he do not bar the entail, at the instant of his death he has but an interest for his life (*t*). Under a statute, however, of the present reign (*u*), judgment debts were made binding on the lands, not only as against the issue in tail of the debtor, but against all other persons whom he might without the assent of any other person cut off and debar from any remainder, reversion, or other interest. A later Act, however, provided that a judgment should not affect any land until it had been actually delivered in execution by virtue of a writ of *elegit* or other lawful authority (*x*).

Land Transfer Act see section 1897.

Bankruptcy.

On the bankruptcy of a tenant in tail the estate tail may be barred by the trustee in bankruptcy, and the property disposed of for an interest commensurate with that which, under the Act

(*n*) *Ib.* s. 42, re-enacted in 40 & 41 Vict. c. 18, s. 55; but see 45 & 46 Vict. c. 38, s. 58 (1) (i.).

(*o*) See *ante*, chap. ii. p. 47 *et seq.*

(*p*) 40 & 41 Vict. c. 18, ss. 23, 46 and 55.

(*q*) 45 & 46 Vict. c. 38, s. 58 (1) (i.). This provision expressly includes "a tenant in tail who is by Act of Parliament restrained from barring or defeating his estate tail, and although the reversion is in the Crown;" but it does not include a tenant in tail "where the land was purchased with money provided by Parliament in consideration of public services."

(*r*) See *ante*, chap. ii. p. 49 *et seq.* The case of the tenant for life or person having the powers of tenant for life being an infant is provided for by s. 60.

(*s*) 33 Hen. VIII. c. 39.

(*t*) *Per* Ld. Hardwicke, *Paggel* v. *Gee*, 9 Mod. 482.

(*u*) 1 & 2 Vict. c. 110. See ss. 11, 13, 18, 19.

(*x*) 27 & 28 Vict. c. 112, s. 1; see *post*, ch. xiv.

for the Abolition of Fines and Recoveries, the tenant in tail might himself have acquired; and the provisions of that Act relating to the lands of a bankrupt are applied to proceedings in bankruptcy under the Bankruptcy Act, 1883 (*y*).

IV. Estates *pur autre vie*. *Quasi*-entail.

The general character of an estate *pur autre vie* was described in the last chapter. Should an estate of this description, instead of being limited to "A. and his heirs" generally, or to A. and his executors or administrators, be limited to A. and "the heirs of his body," he would take what is called a *quasi*-estate tail in it; that is, an estate in the nature of an estate tail; and that estate, unless the entail should be barred, would descend during its continuance in the same manner as an ordinary estate tail.

The owner, however, in possession of such an estate, may bar his issue and the remaindermen by any ordinary deed of conveyance, and without the enrolment prescribed by the Act for the Abolition of Fines and Recoveries. But if the estate be in remainder expectant on an estate for life, the concurrence of the tenant for life is necessary to enable the tenant in tail to defeat the subsequent remainders (*a*).

V. Personalty settled on trusts similar to estates of freehold.

As stated in a previous chapter (*b*), there cannot be an "estate," properly so-called, in personal property, and therefore there cannot be an estate tail in such property; a conveyance of personal property of any kind to A. and the heirs of his body, will simply vest in him the absolute interest in the property conveyed. If personalty be settled on trusts to correspond with the uses of freeholds settled to the use of A. for life with remainder after his death to his eldest son in tail, with remainders over, it will vest absolutely in the first tenant in tail of the freeholds immediately upon his birth, and the addition of the words "so far as the rules of law and equity will permit," would make no difference in this respect (*c*).

Where it is desired that leaseholds and chattels (as plate, furniture, or pictures to be held as heirlooms (*d*)), should be settled in the same manner as freeholds limited in "strict settlement,"

(*y*) 46 & 47 Vict. c. 52, s. 56 (5), applying 3 & 4 Wm. IV. c. 74, ss. 56—73.

(*a*) *Edwards* v. *Champion*, 3 De G. M. & G. 202; and Wms. R. P. 78. See these *quasi*-estates tail discussed in *Allen* v. *Allen*, 2 Dr. & War. 307, by Sir. E. Sugden, L. C. of Ireland.

(*b*) Chap. ii. p. 28. Elph. N. & C Interp. 260.

(*c*) 3 Da. i. 600.

(*d*) See *ante*, p. 12.

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as the kind of settlement to which we have alluded is called (*e*), this may be effected, to a certain extent, namely, by inserting an express provision that they are to be held on trusts to correspond with the uses of the freeholds (or, if chattels, it may be expressed that they are to be treated as heirlooms), but so that they shall not vest absolutely in any tenant in tail *by purchase* (*f*) until he attains twenty-one, and in case of his death under that age shall go as if they had been freeholds of inheritance included in the settlement (*g*). Leaseholds and chattels are sometimes (*h*), in order to insure their devolution in all events with the freeholds, settled by means of a trust for sale, and for reinvestment in the purchase of freeholds, to be settled to the same uses as the devised freeholds, with a power to postpone the sale, and a direction that the rents and enjoyment until sale shall belong to the persons who would be entitled to the rents of the substituted freeholds (*i*).

Settlement of realty by trust for sale.

In the case of real property, where it is not wished to make a "strict settlement," but that the children should take equally, recourse is had to a trust for sale, whereby the real property is constructively converted into personalty. The mode and scope of such settlement are thus shortly described by Mr. Prideaux:—

"Where the property to be settled consists of land, and it is desired to settle it so that the children shall take equally, the proper mode of attaining that object is by conveying it to trustees in trust for sale, either at once, or after limitations to the husband and wife successively for life, and then settling the proceeds as personal estate, with a proviso that until sale, the rents and profits shall be paid and applied in the same manner as the income of the proceeds would be applicable if a sale had been made. The trust for sale is mere machinery to effect a division of the property, without the necessity of the complicated and inconvenient limitations which would be necessary if the land were settled as real estate" (*k*).

(*e*) *Ante*, p. 72. See, as to the objects and form of strict settlements, Elph. Introd., pp. 325 *et seq.*

(*f*) *Post*, p. 126. "The effect of the words 'by purchase' in such a limitation is to prevent the application of the rule against perpetuities; for, if the limitation were to tenants in tail taking *by descent* as well as by purchase, there might be a series of such tenants in tail taking by descent who might die under age, and the vesting might be protracted indefinitely;" Watson's Compendium of Equity, vol. i. p. 248. See *Christie* v. *Gosling*, L. R. 1 H. L. 279.

(*g*) 3 Da. i. 602, 627; and see *Miles* v. *Harford*, 12 Ch. D. 691. For forms see, as to leaseholds, 3 Da. ii. 1130, and 4 Da. 435; as to chattels, 3 Da. ii. 1117, 1133, 1180, and 1224, and 4 Da. 438. The leading case on this subject is *Ld. Scarsdale* v. *Curzon*, 1 J. & H. 40.

(*h*) 4 Da. 436, note (*k*).

(*i*) See Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 37.

(*k*) 2 Prid. 245; see as to settlements of this kind, 4 Da. 7, and Elph. Introd. 276. See also as to "Conversion," note to *Fletcher* v. *Ashburner*, White & Tudor's L. Ca. in Eq. vol. i.

Real property thus settled by way of trust for sale is "settled land" within the meaning of the Settled Land Act, 1882, and the person (or persons) for the time being beneficially entitled to the income of the land till sale is the tenant for life, and the provisions of the Act are made generally to apply as in the case of a strict settlement (*l*). But under the Settled Land Act, 1884, the tenant for life, before exercising the powers conferred by the Act of 1882, must obtain the leave of the Court, and the order giving leave is to be registered as a *lis pendens* (*m*). In the absence of such order, the trustees of the settlement or other person thereby authorised may sell and execute any of the trusts or powers (*n*) created by it without any consent not required by the settlement (*o*).

(*l*) 45 & 46 Vict. c. 38, s. 63; and see s. 58 (1) (ix.).

(*m*) 47 & 48 Vict. c. 18, s. 7, *post*, p. 102.

(*n*) That is, trusts or powers contained in a settlement by way of *trust* for sale (within s. 63 of the S. L. Act, 1882), but in the case of a settlement of the land itself, not by way of trust for sale, the consent of the tenant for life is necessary to the exercise of powers by the trustees; S. L. Act, 1882, s. 56.

(*o*) 47 & 48 Vict. c. 18, s. 6 (1). See s. 6 (2), *ante*, p. 53*n* (*m*). See as to the effect of ss. 6 & 7 of the Act, *Re Harding's Estate* (1891), 1 Ch. 60.

CHAPTER IV.

ESTATES IN FEE SIMPLE.

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I. Distinction between estates for life, estates in tail, estates in fee.

We have now to consider the third and remaining class into which, in point of quantity (that is, continuance or duration), estates are divided, namely, estates in "fee simple."

An estate for life, as its name imports, is, we have seen, limited by the duration of the life or lives for which it is holden. An estate tail so far partakes of the nature of an estate for life, that, unless changed by its owner in its very nature, and, under the special statutory provisions for the purpose, converted by him into an estate of a different character with ampler ownership, the control of the owner over it ceases on his death; it is not subject to his testamentary disposition; although it devolves on persons deriving their right of succession from their descent from the first taker, it goes to the particular class of heirs indicated by the original grant, and therefore their title is to be ascribed not to their representing their ancestor, but to their answering the description of the persons pointed out in the grant. An estate in fee simple on the contrary is not only subject to the alienation of the owner in his life by any of the assurances proper for the transfer of real estate, and like the rest of his property applicable during his life in satisfaction of his debts, but it is subject also after his death to his debts, and is devisable by his will; and, if not devised, so long as there exist any heirs, male or female (*a*), of the last person entitled who acquired his title by purchase, (which expression includes a devisee), that is, otherwise than by inheritance, the estate will descend. In the case, however, of the last person entitled being a bastard, the estate can only descend in case of his death intestate to his lineal issue in the descending line, for he is in law *filius nullius*, and therefore cannot have heirs in the ascending line or collateral heirs.

(*a*) Subject to the one case provided for by 22 & 23 Vict. c. 35, s. 19; see *post*, p. 136.

Escheat.

Only in the event of the last owner dying intestate and a total failure of heirs, will an estate in fee simple come to an end, and an escheat occur, *i.e.* "the lands fall to the lord of whom they are holden" (*aa*), and out of whose estate the estate of his tenant in fee simple was originally derived. In ancient days, the escheat would have enured to the immediate lord of the fee; but now, mesne tenure having generally disappeared (*b*), the Crown takes, in most cases, as being lord paramount of the whole soil of the country (*c*).

Origin of the term "fee."

The term "fee" is taken from the Latin word "*feodum*," and means the same as a fief or feud. In its origin it was used in opposition to "allodial," and indicated the feudal character of the holding; but it is now used in English law to signify an estate of inheritance (*d*), and a "fee simple" is merely spoken of in opposition to a "fee tail." As Lord Coke says:—

"'Simple' is added, for that it is descendible to the heirs generally that is, simply, without restraint to the heirs of the body or the like" (*e*).

It is the greatest estate or interest which the Law of England allows any subject to possess in real property.

Words of inheritance—in Deeds;

In the last chapter it was pointed out that, the use of words referring both to inheritance and to procreation is necessary to create an estate tail (*f*). In the case of a fee simple, words of inheritance alone are requisite; that is to say, in every conveyance *inter vivos* before 1882 of an estate in fee simple, for the purpose of marking out, or "limiting," the estate, the use of the word "heirs" was necessary.

(*aa*) Co. Litt. 13*a*.

(*b*) Because, the statute of *Quia Emptores* having forbidden sub-infeudation, which created mesne tenures, all such tenures must have had their origin before the date (A.D. 1290) of that statute, and by lapse of time they can seldom now be traced and the immediate lord is therefore unknown. See on this statute, Digby, R. P. 189 *et seq.*, and see its text, *ib.* 192.

(*c*) As to escheat, see 3 Cruise, Dig. Tit. xxx., pp. 396 *et seq.*; Digby, R. P. 82, 380; Wms., R. P. 150; Challis, R. P. ch. vi. p. 29; Tud. L. C. R. P. 772 (note to *A.-G.* v. *Sands*); Chitty Prerog. 226. On escheat the lord does not take the estate of the tenant, for that estate is extinguished, and "the lord resumes the possession of the land upon the determination of the grant to the tenant:" *per* Wigram, V.-C., *Downe* v. *Morris*, 3 Hare, 394, at p. 402. As to escheat of incorporeal hereditaments and equitable estates, see the Intestates Estates Act, 1884 (47 & 48 Vict. c. 71), s. 4, and the remarks thereon in Challis, R. P. *ubi sup.*

(*d*) See Challis, R. P. 167; and as to the meaning of *feodum* or "feud," see Maine, Early Law and Custom, Ch. x. pp. 338 *et seq.*, and 346; Digby, R. P 31*n*, 59*n*, and 70*n*.

(*e*) Co. Litt. 1*b*; and see *ante*, p. 56.

(*f*) *Ante*, p. 59.

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in Wills.

Where, however, in a will the intention was apparent to pass an estate in fee simple, the Courts, notwithstanding the absence of words of inheritance, would construe the devise to be of an estate in fee simple, even prior to the Wills Act. And the reason of this, as expressed by Blackstone, was, that wills, being often drawn up when the testator is *inops concilii*, are always more favoured in construction than formal deeds, which are presumed to be made with great caution, forethought, and advice (g). It was, however, presumed, unless the contrary was manifest from the context, that in the absence of words of inheritance the testator's intention was only to confer a life estate. The Wills Act (h) has reversed that presumption, and has enacted that, unless a contrary intention shall appear by the will, a devise of real estate shall be construed to pass the fee simple (or other the whole estate or interest which the testator had power to dispose of by will). Thus, if by deed a man were to convey land, of which he was owner in fee, in the form of a limitation to A. B., as distinguished from one to A. B. and his heirs, A. B. would take only for life, and that notwithstanding the gift was to A. B. "for ever," or to him "and his assigns for ever" (i). If he had done the same by will, previously to the Wills Act, A. B. would still have taken only for life, unless he could satisfy the Court from the context of the will that it was the testator's intention to confer on him an estate in fee; as, where the devise was to A. B. "in fee simple," or to him "for ever," or to him "and his assigns for ever"; or the devise was of the testator's "estate," or "estates," or of his "property," or of his "inheritance" (k). But since the Wills Act, A. B. would be presumed to take an estate in fee, unless the parties interested to dispute it could establish to the satisfaction of the Court, in like manner from the context, that he was not to take one—in other words, unless they could rebut the presumption. The principle on which the necessity of mentioning the heirs was founded, is to be looked for in the feudal system, under which the inducement to a gift of lands was the personal ability of the grantee to perform the services; and even

Wills Act.

(g) 2 Bl. 172.

(h) 1 Vict. c. 26, s. 28. *Post*, ch. xv.

(i) 2 Bl. 107. "'Assigns' is not a word of limitation; it only means to enable that the man takes an assignable estate." per Jessel, M.R.; *Osborne* to *Rowlett*, 13 Ch. D. 777. For some exceptional cases, where the fee passes without the word "heirs," see Elph. N. & C. Interp. 226.

(k) 2 Jarman on Wills, 274.

after such lands descended to the heir after the death of the original donee, they could only descend when the heirs were mentioned in the gift (*l*).

Corporations (*ll*).

A corporation, whether sole or aggregate, can have no heirs. A gift to a corporation sole and his "successors" confers a fee simple, but without the word "successors" it confers an estate for his life only. A gift to a corporation aggregate where all can take, *i.e.* where all the individual members are in law capable, passes the fee without any words of limitation; but, if one only of the corporation can take (*m*), the use of the word "successors" is necessary (*n*). Owing to the use of the word "successors" in the Lands Clauses Consolidation Act, 1845 (*o*), it is the practice in limitations of the fee simple to corporations aggregate to employ the word "successors."

Now under the Conveyancing and Law of Property Act, 1881, in deeds executed after the 31st December, 1881, it is sufficient in the limitation of an estate in fee simple, to use the words "in fee simple" without the word "heirs" (*p*). Presumably this enactment does not enable an estate in fee simple to be limited to a corporation sole without the use of the word "successors."

Estates in fee simple have been divided into three classes—(1), absolute; (2), qualified or base; and (3), conditional (*q*).

1. Fee simple absolute.

The term "fee simple absolute" speaks for itself. It is the ordinary unqualified estate limited to a man and his heirs, and is understood to be intended by the term "fee simple," without more.

2. Qualified, or base fee.

A "qualified" or "base fee" is where a qualification is annexed to the estate, so that it must determine whenever the qualification is at an end. Until such time the proprietor has all the rights of a tenant in fee simple. The right of holding the lands may continue for ever, unless it be determined by the happening of the event specified by the words of the qualification. The nature of a qualified or base fee will be best understood by illustration. A grant to A. and his heirs, tenants of the Manor of Dale (*r*), is a base fee. It is not an absolute fee, because it has the qualifica-

(*l*) 2 Bl. 108.

(*ll*) *Post*, p. 86.

(*m*) See Co. Litt. 94*b*; *e.g.*, in the case of an abbot or prior, and convent, whose members were dead in law and whose head only could take.

(*n*) See Elph. N. & C. Interp. 226, as to limitations to corporations.

(*o*) 8 & 9 Vict. c. 18.

(*p*) 44 & 45 Vict. c. 41, s. 51, and see 3rd form in 4th sched. See *ante*, p. 60.

(*q*) Co. Litt. 1*b*; 2 Bl. 109; Challis, R. P. 43.

(*r*) Co. Litt. 27*a*.

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tion attached to it that there shall be a concurrent tenancy of the Manor of Dale. Were the concurrent tenancy of the Manor to come to an end, the estate granted to A. and his heirs would also come to an end. But so long as the qualification—that is, the concurrent tenancy—continues, A. and his heirs or assigns will have all the rights of a tenant in fee simple.

We have seen in the last chapter an instance of a base fee, in the case of a tenant in tail in remainder, for want of the protector's consent, acquiring or disposing of a fee simple limited only to the period during which, but for the destruction of the estate tail itself, the estate tail might have lasted; that is, during the existence of the donee's issue of the prescribed class (s).

Lord Coke says:—

"A parson or vicar, for the benefit of the Church and of his successor, is in some cases esteemed in law to have a fee simple qualified; but to do anything to the prejudice of his successor, in many cases the law adjudgeth him to have in effect but an estate for life" (t).

3. Conditional fee.

"A conditional fee at the common law," says Blackstone (u), "was a fee restrained to some particular heirs, exclusive of others. . . . . It was called a conditional fee, by reason of the condition expressed or implied in the donation of it—that is, if the donee died without such particular heirs, the land should revert to the donor."

A conditional fee was, at common law, created by a gift to A. and the heirs of his body, which estate (as we have seen) was converted by the Statute *De Donis Conditionalibus* into an estate tail (x).

II. Alienability.

Every estate in fee simple is, under the existing law, subject to alienation by its owner in his lifetime; or to the operation of his testamentary disposition after his death: and this is so as to the entire estate. This, however, must be taken with the qualification that the alienation must be effected by such assurances (*i.e.*, forms of conveyance) as are recognised by the law, and that the disposition itself must not contravene any rule of law; and it may be not only to the full extent of the estate which is vested in the tenant himself, but for any smaller estate.

The consideration of the nature and operation of these assurances is reserved for a later chapter (y), but it may be here stated

(s) *Ante*, p. 70.

(t) Co. Litt. 341*a*. See *per* M R. in *Mulliner* v. *Midland Rail. Co.*, 11 Ch. D. 622.

(u) Vol. ii. 110.

(x) *Ante*, p. 60.

(y) Chap. xiv.

Inter vivos.
By deed.

that in the case of an alienation during the lifetime of the owner —one, as it is termed, "*inter vivos*"—the prescribed assurance is a deed. The beneficial or equitable interest may indeed be effectually conveyed by a writing not under seal, but for the legal transfer of the estate itself, the divesting from one party and the vesting it in another, a document sealed and delivered, in other words a deed, is required.

Formerly at common law, the conveyance of an estate in possession was by livery of seisin, which was generally accompanied by a charter of feoffment. The estate, however, passed by the livery alone, and no written instrument was required until it was by the Statute of Frauds (*z*) made necessary that the conveyance should be evidenced by writing signed by the party, or his agent by writing lawfully authorised. Estates in expectancy (that is, remainders and reversions) and incorporeal hereditaments were transferred by deed of grant, and they were said to "lie in grant," but estates in possession in corporeal hereditaments to "lie in livery." But by the Act to amend the Law of Real Property (*a*), it is enacted that after the 1st October, 1845, all corporeal tenements and hereditaments shall, as regards the conveyance of the immediate freehold (*b*), be deemed to lie in grant as well as in livery; and that a feoffment made after that date (other than a feoffment made under a custom by an infant) (*c*) shall be void at law unless evidenced by deed: so that a simple deed of grant became the ordinary form of conveyance of estates, whether in possession or in expectancy, in freehold lands.

Since the coming into operation of the above Act, it has become the practice to use the word "grant" in conveyances of freehold land. By the Conveyancing and Law of Property Act, 1881, it has been declared that in regard to conveyances made before or after the Act, the use of the word "grant" is not necessary in order to convey tenements and hereditaments, corporeal or incorporeal (*d*). Certain short forms of conveyance were authorised by 8 & 9 Vict. c. 119, but these did not commend themselves to the profession, and were not adopted. The Lands Clauses Con-

(*z*) 29 Car. II. c. iii. s. 1. See *post*, ch. xiv.

(*a*) 8 & 9 Vict. c. 106, ss. 2 and 3. See the observations on this Act prefixed to Davidson's Concise Precedents.

(*b*) *I.e.*, the present estate in possession.

(*c*) And such feoffment must be evidenced by a deed or writing signed by the infant's own hand (2 Da. i. 245).

(*d*) 44 & 45 Vict. c. 41, s. 49.

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solidation Act (*e*) contains a statutory form of conveyance, which, though optional, has a special efficacy (*f*) for use in cases of purchases under that Act, which contains provisions as to the compulsory taking of lands for undertakings of a public nature.

Registry Acts —Middlesex and Yorkshire

Further, if the property be subject to the operation of any of the local registration Acts, a memorial of the conveyance, *i.e.*, a concise statement of the effect of the deed in the prescribed form, should be registered as soon as practicable after execution (*g*)—that is to say, if the premises are situate in the county of Middlesex (*h*) (exclusive of the City of London), or the North, East, or West Ridings of Yorkshire, or in the town and county of Kingston-upon-Hull. But there is no general registry for the whole country.

A short statutory form of deed was provided by the Legislature in 1862, by an Act to facilitate the transfer of freehold lands (and leaseholds), which might be used for the transfer of lands the title to which had been registered under the provisions of the Act (*i*). This Act was superseded by the Land Transfer Act, 1875 (*k*), under which the registration of title by the proprietor is, as under the former Act, optional; but if registered, the lands may be transferred in manner to be prescribed by rules under the Act (*l*), and the transfer is to be completed by the registrar entering on the register the transferee as proprietor of the land transferred.

see Land Transfer Act 1897.

Will.

In the case of a disposition operative only after death, the assurance is by an instrument called a "Will," for which statute law has prescribed (as will be seen later) an execution in accordance with certain forms, and a certain number of witnesses (*m*).

The Statute of Quia Emptores (*n*), it will be observed, merely conferred a power of alienation *inter vivos*. The power of testamentary disposition, or of gift by "devise," as it was termed (*o*),

(*e*) 8 & 9 Vict. c. 18, s. 81.

(*f*) Dart, V. & P. 575.

(*g*) See, as to the Registry Acts, Elph. & C. on Searches, 125 *et seq.*

(*h*) *I.e.*, within the limits of the county before they were altered by the Local Government Act, 1888 (51 & 52 Vict. c. 41). See ss. 40 and 96.

(*i*) 25 & 26 Vict. c. 53.

(*k*) 38 & 39 Vict. c. 87.

(*l*) Ss. 111, 29, 4.

(*m*) See *post*, ch. xv.

(*n*) 18 Ed. I. c. 1; discussed Williams, R. P. ch. iii. p. 81. See its text in Digby, R. P. 192.

(*o*) Wms. 62; but see 1 St. Bl. 234, note. *Post*, ch. xv.

was so far a matter of later growth that though it had existed before the Conquest, it ceased to exist after the Conquest except in some particular boroughs, in which there existed a special custom (*p*).

Alienation not to contravene policy of the law.

One of the conditions to which the power of alienation is subject is that the disposition of the property must be of a character not contravening the policy of the law; and by "policy of the law" are meant those principles of jurisprudence which underlie and form part of the institutions of the country, and which may perhaps be more correctly considered as matter of public policy than of technical law. On this subject Jessel, M.R., said in the case of *Besant* v. *Wood* (*q*):—

"Public Policy."

"You cannot lay down any definition of the term 'public policy,' or say it comprises such and such a proposition, and does not comprise such and such another; that must be, to a great extent, a matter of individual opinion, because what one man, or one judge, and perhaps I ought to say one woman also, might think against public policy, another might think altogether excellent public policy. Consequently, it is impossible to say what the opinion of a man or a judge might be as to what public policy is. For a great number of years, both ecclesiastical judges and lay judges thought it was something very horrible, and against public policy, that the husband and wife should agree to live separate, and it was supposed that a civilised country could no longer exist if such agreements were enforced by Courts of law, whether ecclesiastical or not. But a change came over judicial opinion as to public policy; other considerations arose, and people began to think that after all it might be better and more beneficial for married people to avoid in many cases the expense and the scandal of suits of divorce by settling their differences quietly by the aid of friends out of Court, although the consequence might be that they would live separately; and that was the view carried out by the Courts when it became once decided that separation deeds *per se* were not against public policy."

Mortmain.

A prominent instance, dating from a very early period of the history of English law, of the rule, that the alienation must not be contrary to public policy, is the prohibition of such alienation as would lock up land in the hands of some body invested with the character of a perpetual succession (*r*). In the old Norman

(*p*) See Co. Litt. 111*a*, and Mr. Hargrave's note at 111*b*.

(*q*) 12 Ch. D. 620.

(*r*) It is interesting to see the extreme anger with which the Elizabethan lawyers regarded the early attempts at making settlements of such a nature that the land could not be alienated by the first taker. For instance in *Mary Portington's Case* (10 Rep. 35*b*), it was decided that a tenant in tail cannot be restrained by any condition or limitation from suffering a common recovery. Coke comments on this case in the words following (see preface to 10 Rep., p. 2.): "Then I have published in *Mary Portington's Case*, for

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Corporations—ecclesiastical, lay—aggregate, sole.

French, the language of our ancient law, this was termed (as we have seen) putting the land into "mortmain," or "dead hand" (s). Bodies of the character here referred to are what are called "corporations," or bodies corporate; and these are "ecclesiastical" or "lay," "aggregate" or "sole"; their distinguishing characteristic being their existence or succession in perpetuity. Corporations exist by virtue of a charter of incorporation by the Crown, or by prescription, or by Act of Parliament (t). Their nature will be best understood by illustrations. A very early form of such a body was a monastery—a body of persons associated together in common brotherhood, and acquiring common property for the purposes of religion; the establishment of a religious house consisting of a brotherhood of monks or priests with a priest for their head: vacancies occurring in their body, as by death, might be from time to time filled up, so as to keep up a perpetual existence. Monasteries were dissolved in England *temp.* Hen. VIII., but a cathedral or church may have a body of clergy attached to it called canons, whose head is termed a dean, and such a body may hold lands devoted to the keeping up of the church, the performance of its religious services, and the maintenance of the priests; vacancies in the body being filled up as they from time to time arise. These are called "ecclesiastical corporations." A "lay corporation" exists, for instance, where a grant has been made by the Crown conferring the government of some particular town or city upon some

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the general good both of prince and country, the honourable funeral of fond and new found perpetuities, a monstrous brood carved out of mere invention, and never known to the ancient sages of the law; I say monstrous, for that the naturalist saith '*Quod monstra generantur propter corruptionem alicujus principii:*' and yet I say honourable, for that these vermin have crept into many honourable families, at whose solemn funeral I was present, and accompanied the dead to the grave of oblivion but mourned not, for that the commonwealth rejoiced that fettered freeholds and inheritances were set at liberty, and many and manifold inconveniences to the head and all the members of the commonwealth thereby avoided."

(s) "*Ad manum mortuam*" are the words of the statute *De Viris Religiosis* (7 Edw. I. stat. 2, c. 13). See Digby, R. P. 173, 174:—"Lands were said to come into a 'dead hand' when they were held not by an individual tenant, but by a corporation or body. This expression was probably first applied to the holding of lands by religious bodies or persons who, being 'professed,' were reckoned dead persons in law. It then came to be applied to the holding of lands by corporations as opposed to individuals, whether the corporations were ecclesiastical or lay, sole or aggregate." The words in 15 Ric. II. c. 5 (Digby, R. P. 289), are "*a mort mayn.*"

(t) 1 Bl. 469 *et seq.*; Chitty Prerog. 121; Grant on Corporations, 6.

special body of its inhabitants, as, for instance, on a mayor, aldermen, and burgesses; or, where a charter of incorporation has been granted to some community of individuals associated together for purposes of commerce and profit, with a governing body or directors for the management of its affairs, and with provisions as vacancies occur for recruiting the number of members and preserving the society. As examples of the former class, the corporations of London, Bristol, &c., may be cited—of the latter, the East India Company and other old trading companies. A college in a university is another example.

The corporations instanced—whether ecclesiastical or lay—are "corporations aggregate." A "corporation sole" consists of one person only, and his successors—for instance, the sovereign, a bishop, a parson, or vicar; the office of each of the latter, instead of ceasing on his death or withdrawal, is filled up by the appointment of a successor and is thus perpetual, and the rights and possessions attached to it are inseparable from it.

Now, it is obvious that to place property, dedicated to military services, as under the feudal system, in the hands of bodies of this nature, would be to annihilate the services themselves; and, as regards other obligations, not of a military character, on the holder of lands, to vest the lands in a corporation would be to deprive the lord of the benefits to be derived from them in the hands of his tenants—namely, his wardships, reliefs, escheats, and other advantages, the incidents of his seignory. But these considerations, however weighty with lords, weighed but lightly against the inclinations of tenants, who were easily prevailed on by the ecclesiastics to make grants of land to the Church for what they termed "pious uses." The result was, that within two centuries of the Norman Conquest, a very large portion of the lands of the country previously subject to feudal services had got into the hands of ecclesiastical corporations.

Statutes of Mortmain.

The interest of the lords procured the enactment of a series of Statutes, called Statutes of Mortmain, addressed to the remedy of these grievances. The first legislative enactment against such alienations was contained in Magna Charta, 9 Hen. III. c. 36 (*u*), and was directed only against gifts (*i.e.* of the fee simple) to "religious houses." The attempted evasion of this on the part of the ecclesiastics by taking long leases for years, led to the

(*u*) 2nd Instit. 74; see the clause in Digby, R. P. p. 114.

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Statute De Viris Religiosis (*x*), which provided that no person, religious or other whatsoever, should buy or sell, or receive under pretence of a gift or a term of years or any other title whatsoever, or should by any art or device appropriate to himself, any lands or tenements whereby the same should come into mortmain; upon pain that the immediate lord of the fee, or, on his default for one year, the next lords paramount successively, and, in default of all of them, the king, might enter thereon as upon a forfeiture. The ecclesiastics, backed by the astuteness of the lawyers, long struggled to evade the enactments against the alienation of land in mortmain. Their first expedient was the collusive action, known as a recovery, which we have above explained. This was held (*y*) not to be within the Statute De Viris Religiosis; but it was defeated by the Statute of Westminster the Second (*z*). They then resorted to a new mode of conveyance, namely, not to themselves directly, but to a nominal feoffee to the use of the religious house, they then taking the profits while the feoffee had the seisin or legal possession; for the Court of Chancery (then under the direction of the clergy) held the feoffee bound to account for the profits to the *cestui que use* (*a*). This device was defeated by 15 Rich. II. c. 5, in which statute the doctrine of mortmain is applied to certain lay corporations, viz., guilds or fraternities, and mayors, bailiffs, and commons of cities, boroughs, and other towns (*b*).

Licence from the Crown.

And now no lands can be held by a corporation except by licence from the Crown, or under special statutory powers (*c*). The power of the Crown to grant such licences is a very early principle of the common law, and is stated to have had existence even before the Norman Conquest, in the time of the Saxons (*d*). However that may have been, the power to grant licences, notwithstanding the Statutes of Mortmain, was soon established.

Under those statutes an alienation in mortmain gave a right to

(*x*) 7 Ed. I. st. 2. See this statute in Digby, R. P. 175.

(*y*) Digby, R. P. 174.

(*z*) 13 Edw. I. c. 32; Digby, R. P. 174, 177; 2nd Instit. 428.

(*a*) 2 Bl. 271.

(*b*) See this statute in Digby, R. P. 289.

(*c*) The Mortmain and Charitable Uses Act, 1888, 51 & 52 Vict. c. 42, ss. 1 and 2 (which repeals the Statute De Viris Religiosis and the Statute 15 Ric. II. c. 5). On the history of the law as to mortmain, see Tudor's Charitable Trusts (3rd ed., by Bristowe & Cook), pp. 371 *et seq.*

(*d*) Shelford on Mortmain, 35. As to the early history of licences to hold in mortmain, see Tudor, Charit. Trusts, 3rd ed. 375.

the mesne lords or on their default (*e*) the king to enter upon and seize the land; but, if such right was waived, the alienation was good. When a tenant could not alien without the consent of his lord, the licence must have been from the immediate lord, the mediate lords (if any), and the king (*f*), but a licence from the Crown alone is now sufficient (*g*). A mode of applying for licence from the king was prescribed (*h*). The pretended power of the Crown to supersede or dispense with laws, or the execution of laws, without consent of Parliament having been declared illegal by 1 Wm. & Mary, c. 2, it was thought prudent to confirm by Act of Parliament the king's power of granting licences in mortmain; and as, by the long operation of the Statute of Quia Emptores, most mesne lordships had disappeared, it was provided by 7 & 8 Will. III. c. 37, repealed and re-enacted by 51 & 52 Vict. c. 42, s. 1, that the Crown at its discretion might grant licences to alien or take lands in mortmain, and that when such licence had been given the lands should not be subject to forfeiture by reason of the alienation (*i*).

Charters of incorporation usually contain a clause declaring that the intended corporation shall for ever thereafter be able and capable in the law and have power (notwithstanding the Statutes of Mortmain) to purchase, hold, and enjoy to them and their successors any lands, tenements, and hereditaments whatsoever (to a specified value), without incurring the penalties or forfeitures of the Statutes of Mortmain or any of them (*k*).

Power of charities to purchase land, &c.

By the Charitable Trusts Amendment Act, 1855 (*l*), it is provided that any incorporated charity, or the trustees of any charity, whether incorporated or not, may, with the consent of the Charity Commissioners, invest money arising from any sale of land belonging to the charity, or received by way of equality of exchange or partition, in the purchase of land, and may hold such land without any licence in mortmain (*m*). By the Charitable Trusts Act, 1853 (*n*), and subsequent statutes (*o*), all endowed charities, in-

Charity Commissioners.

(*e*) Co. Litt. 2*b*.
(*f*) Shelford, Mortm. 35.
(*g*) 51 & 52 Vict. c. 42, s. 1.
(*h*) 27 Ed. I. st. 2.
(*i*) Shelford, Mortm. 39.
(*k*) Shelford, Mortm. 40.
(*l*) 18 & 19 Vict. c. 124, s. 35.
(*m*) See also 33 & 34 Vict. c. 34, which allows "all corporations or trustees, holding moneys in trust for any public or charitable purpose," to invest such moneys on mortgage of land; but, on foreclosure, the land must be sold.
(*n*) 16 & 17 Vict. c. 137.
(*o*) Namely, 18 & 19 Vict. c. 124; 23 & 24 Vict. c. 136; 25 & 26 Vict. c. 112; 32 & 33 Vict. c. 110 (see s. 12, empowering majority of trustees to deal with

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cluding schools, are placed under the control of the Charity Commissioners; and to facilitate the incorporation of trustees of charities established for religious, educational, literary, scientific, or public charitable purposes, power has been given by the Charitable Trustees Incorporation Act, 1872 (*p*), to the Commissioners, on the application of the trustees of any such charities, to grant to them a certificate of registration as a corporate body (*q*).

Joint Stock Companies.

Statutory power has also been given to joint stock companies registered under the Companies Act, 1862, to hold lands (*r*); and no limit is imposed, except by a section (*s*) which enacts that:—

> "No company formed for the purpose of promoting art, science, religion, charity, or any other like object, not involving the acquisition of gain by the company or by the individual members thereof, shall, without the sanction of the Board of Trade, hold more than two acres of land."

Similarly by the Public Health Act, 1875 (*t*), urban and rural sanitary authorities and by the Local Government Act, 1888 (*u*), County Councils are empowered to purchase and hold lands for the purposes of the Act. Further exemptions are contained in the Mortmain and Charitable Uses Act, 1888 (*x*).

Mortmain Act. 9 Geo. II. c. 36: Charitable Uses.

The principle of the ancient statutes against alienation in mortmain has been extended in more modern times to a mischief of somewhat analogous, though not altogether identical, character. A statute of the reign of George II. (*y*), commonly, though improperly, called "The Mortmain Act" (*z*), based as it recites on the impolicy of allowing gifts, under the name of charity, to be made by persons in view of approaching death, to the disherison of their lawful heirs, prohibited, except in the instance of a few favoured institutions—viz., the Universities of Oxford and Cambridge, and their colleges, and the colleges of Eton, Winchester,

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property of the charity); 37 & 38 Vict. c. 87; 50 & 51 Vict. c. 49. For a concise account of these Acts, see Tudor, Charit. Trusts, pp. 449 *et seq.*

(*p*) 35 & 36 Vict. c. 24.

(*q*) Provision has also been made for vesting lands held in trust for a charity in an official trustee; see the 16 & 17 Vict. c. 137, ss. 47, 48; 18 & 19 Vict. c. 124, s. 15; 50 & 51 Vict. c. 49, s. 5.

(*r*) See 25 & 26 Vict. c. 89 (The Companies Act, 1862), ss. 18 and 19.

(*s*) 25 & 26 Vict. c. 89, s. 21.

(*t*) 38 & 39 Vict. c. 55, ss. 7, 164, 175, &c.

(*u*) 51 & 52 Vict. c. 41, s. 79.

(*x*) 51 & 52 Vict. c. 42. See *post*, p. 92.

(*y*) 9 Geo. II. c. 36 (repealed by the Mortmain and Charitable Uses Act, 1888, 51 & 52 Vict. c. 42). See *Corbyn* v. *French*, Tudor's L. C. R. P. 519; *Luckraft* v. *Pridham*, 6 Ch. D. 205; and 4 Da. 129, 312.

(*z*) Shelford on Mortmain, 21.

and Westminster—all alienation of lands or hereditaments for charitable purposes, otherwise than by deed indented, sealed and delivered in the presence of two or more witnesses, twelve months at least before the death of the donor, and enrolled in Chancery within six months after its execution (*a*). It also required that the deed should take effect in possession immediately from the making thereof (*b*), and should be without power of revocation, or any reservation, trust, condition, limitation, clause, or agreement, for the benefit of the grantor or persons claiming under him. The Act, however, contained a saving clause as regards deeds of conveyance for value, when the purchase was really and *bonâ fide* made for full and valuable consideration, actually paid at or before the making of such conveyance. In such cases, it was not essential that the deed should have been executed at least twelve months before the death of the grantor (*c*); but even in these cases the enrolment and other formalities prescribed by the Act were necessary (*d*). By 24 Vict. c. 9, the necessity of the deed being indented was abolished; reservations of a nominal rent, or of minerals, or easements, were permitted, and also covenants as to buildings, &c., and other specified provisions for the benefit of the grantor; and the necessity of enrolling the deed of conveyance was dispensed with where the charitable purposes were disclosed by a separate deed, provided such separate deed were enrolled in Chancery within six months of the perfecting of the deed of conveyance. By 27 & 28 Vict. c. 13, s. 4, it was provided that the "full and valuable consideration," mentioned in the Mortmain Act, might consist wholly or in part of a rent reserved. And by the Rules of the Supreme Court the enrolment is to be in the Central Office (*e*).

By various Acts of Parliament (*f*) want of enrolment within the time prescribed by the 9 Geo. II. c. 36, was allowed to be

(*a*) The Act contains corresponding provisions with respect to money, stock, or other personal estate to be laid out in the purchase of lands.

(*b*) By 26 & 27 Vict. c. 106, leases (made before the Act) for charitable uses are, *for the purposes of certain recited Acts*, to be good if they took effect in possession within one year from their date. The recited Acts are now repealed. See *post*, note (*f*).

(*c*) 9 Geo. II. c. 36, s. 21.

(*d*) See 9 Geo. IV. c. 85, correcting a misapprehension which had arisen on this point, but making past conveyances valid, notwithstanding the formalities had not been observed.

(*e*) See Rules of the Supreme Court, Ord. LXI., r. 9.

(*f*) 24 Vict. c. 9 (ss. 3, 4); 25 Vict. c. 17; 27 & 28 Vict. c. 13 (all now repealed by 51 & 52 Vict. c. 42). See *Webster* v. *Southey*, 36 Ch. D. 9.

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supplied within certain limited periods specified in the Acts; but these provisions were retrospective only. Under general enactments (*g*), applicable to future as well as past transactions, enrolment after the time prescribed by the 9 Geo. II. c. 36 was allowed in cases where the original conveyances or other instruments had been lost or destroyed by time or accident or the omission to enrol in proper time arose from ignorance or inadvertence, provided the instrument was made really and *bonâ fide* for full and valuable consideration, and possession or enjoyment was shown to exist under it. These provisions were repealed and in substance re-enacted by the Mortmain and Charitable Uses Act, 1888 (*h*). This Act also repeals the Act 9 Geo. II. c. 36, and (in Part II. ss. 4 *et seq.*) substitutes provisions to the following effect:—Every assurance of land (or personal estate to be laid out in the purchase of land) for charitable uses is void unless it takes effect in possession immediately, and is without any power of revocation or reservation, condition or provision for the benefit of the "assuror" (grantor) or any person claiming under him, except (1), a nominal rent; (2), mines or minerals; (3), easements; (4), covenants or provisions as to buildings, streets, drainage or nuisances; (5), right of entry on nonpayment of such rent or breach of such covenants or provisions; (6), any stipulations of the like nature for the benefit of the grantor, or any person claiming under him.

Mortmain and Charitable Uses Act, 1888.

If the assurance is made *bonâ fide* on sale for full valuable consideration, the consideration may be a rent or rentcharge with or without a right of re-entry. If the land is freehold, it must be conveyed by deed executed in the presence of at least two witnesses; and, unless the assurance is made for full valuable consideration, it must be made at least twelve calendar months before the death of the grantor. The assurance (whether for valuable consideration or not) must be enrolled in the Central Office within six months after execution.

There are provisions enabling the deed to be enrolled after the six months where the omission to enrol arose from ignorance or inadvertence, or the loss or destruction of the instrument by time or accident.

Assurances by deed of land of any quantity, or by will of a

(*g*) 29 & 30 Vict. c. 57; 35 & 36 Vict. c. 24, s. 13.

(*h*) 51 & 52 Vict. c. 42.

quantity not exceeding twenty acres for a public park, not exceeding two acres for a public museum, and one acre for a schoolhouse for an elementary school, are (*i*) exempted from some of the requirements of the Act; but even in these cases the will, or the deed (if not made in good faith for full and valuable consideration) must be executed not less than twelve months before the death of the testator or grantor, or the devise must be a reproduction in substance of a devise made in a previous will executed not less than twelve months before the death of the testator; and the will must be enrolled within six months after the death of the testator, and the deed within six months from execution, in the books of the Charity Commissioners.

Conveyances or devises to certain Universities and colleges and assurances of land not exceeding two acres to trustees for religious purposes or the promotion of education, literature, art or science are exempted (by s. 7) from the provisions of the Act which impose the conditions above set forth on assurances to charitable uses. There is a clause (s. 8) providing that existing statutory exemptions from the repealed Mortmain Acts shall operate to exclude the corresponding provisions of the present Act.

Gifts by Will to Charities.

It is evident that under the provisions of the above Acts, every testamentary disposition of land for charitable uses is void unless it fall within the exemption in the Mortmain and Charitable Uses Act, 1888 (*k*), or in that given by the statute 43 Geo. III. c. 108, which enacts that a person may by deed enrolled, or will executed, three months at least before his death, give and grant lands or tenements not exceeding five acres, or goods and chattels not exceeding in value £500, for or towards the erecting, rebuilding, repairing, purchasing, or providing any church or chapel for the celebration of divine service according to the rites of the United Church of England and Ireland, or a residence for a minister of that church, or any outbuildings, offices, churchyard, or glebe for the same, and to be for those purposes applied according to the will of the said benefactor in and by such deed enrolled, or by such will or testament executed as aforesaid (*l*).

(*i*) See Part III. (ss. 6 *et seq.*) as to the exemptions.

(*k*) 51 & 52 Vict. c. 42.

(*l*) For cases under this Act, see *O'Brien* v. *Tyssen*, 28 Ch. D. 372; *Re Vaughan, Vaughan* v. *Thomas*, 33 Ch. D. 187 (bequest of money on trust to apply the income in repairing a churchyard); *Re Smith, Clements* v. *Ward*, 35 Ch. D. 589 (bequest by married woman);

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Gifts to superstitious uses.

Reference should be made to alienations to what are called "superstitious uses" (*m*). By 1 Ed. VI. c. 14, the king was declared entitled to all real and certain personal property "theretofore" disposed of for the maintenance of persons to pray for the souls of dead men, &c.; such dispositions were declared to be superstitious, and, as such, void. By the 23 Hen. VIII. c. 10, similar and other superstitious uses "thereafter" declared of land (except for terms of not more than twenty years) were made void (*n*). There is no statute making superstitious uses void generally; but the Courts have treated the statute of Ed. VI. as a declaration that they are illegal (*nn*). Gifts for superstitious uses and forbidden religious trusts are often confused (*o*). Gifts for superstitious uses are gifts which are regarded by our law as not being beneficial either to any particular person or the general public; *e.g.*, a gift to enable prayers to be said for the benefit of the soul of the testator or other deceased persons; gifts of this nature are absolutely void, and the property is undisposed of (*p*). Forbidden religious trusts are trusts for the promotion of any religious views to which penalties are for the time being attached by law. In this case, though the gift cannot be applied in the manner intended by the donor or testator, it will be applied by the Court for charitable purposes as nearly in accordance with his wishes as the law will admit (*q*).

"Charitable purposes."

Before the Mortmain Act (*r*), the law, while it rendered gifts to superstitious uses void, excepted gifts to charitable uses, and held them good, being for a public benefit (*s*). In popular language "charitable purposes" import a benefit to persons who, by reason of poverty, would not otherwise obtain such benefit (*t*). But the term "charity" has in law a meaning at once more

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and Tudor's Charitable Trusts (3rd ed.) 436. Tyssen on Charitable Bequests, pp. 371 *et seq.*

(*m*) Jarman on Wills, i. 205, 211; *Re Blundell's Trusts*, 30 Beav. 360; *Re Elliott*, W. N. 1891, p. 9. See as to superstitious uses, Tudor, Charit. Trusts (3rd ed.), ch. ii. pp. 18 *et seq.*

(*n*) This Act is repealed by 51 & 52 Vict. c. 42. See as to its operation, Tyssen on Charitable Bequests, p. 46.

(*nn*) *Heath* v. *Chapman*, 2 Drew. 417.

(*o*) Tyssen Charitable Bequests, ch. v. p. 36; Tudor, Charitable Trusts, 18.

(*p*) *West* v. *Shuttleworth*, 2 My. & K. 684; *Re Blundell's Trust*, 30 Beav. 360.

(*q*) *Cary* v. *Abbot*, 7 Ves. 490; *Att.-Gen.* v. *Guise*, 2 Vern. 266.

(*r*) 9 Geo. II. c. 36.

(*s*) *Mellick* v. *President, &c., of the Asylum*, Jac. 180.

(*t*) See *The Queen* v. *Commissioners of Income Tax*, 22 Q. B. D. 296, where the majority of the Court of Appeal held that the words have this meaning in the Income Tax Act of 1842 (5 & 6 Vict. c. 35).

restricted and more ample than the popular meaning. For, on the one hand, almsgiving or the relief of the poverty of individuals is not a charitable purpose in the legal sense, and, on the other hand, "charity" in the legal sense extends to all purposes which the law holds to be for the public benefit; and, in order to ascertain what are such purposes, recourse is usually had to the preamble of the statute 43 Eliz. c. 4. In a recent case (*u*) the following remarks were made on this subject by Fry, L.J.:—

"The effect of the statute was remarkable. The Court of Chancery had before that time jurisdiction in matters relating to charity, but, so far as I can ascertain, what was charity was a matter open to discussion. The Court, however, found, in the words to which I have referred [*i.e.*, the preamble of 43 Eliz. c. 4], a declaration of the meaning of the Legislature; and thenceforth 'charity' meant, in all courts which had to do with the subject (but mainly in the Court of Chancery, because it was mainly concerned with the subject), all the uses and intents mentioned in the preamble to the Statute, and all uses and intents analogous to them. . . . From the time of this Statute the expressions 'charitable uses,' 'charitable purposes,' 'charitable trusts,' have, in my opinion, had a well-ascertained signification in English law."

The Mortmain and Charitable Uses Act, 1888 (*x*), repeals the 43 Eliz. c. 4; but it sets out the preamble of that statute, and provides that references to charities shall be construed as references to charities "within the meaning purview and interpretation of the said preamble."

Exemptions from Mortmain Act.

Special exemptions from the operation of the Mortmain Act have from time to time been introduced in favour of particular objects, and a different procedure substituted in each case by the Legislature. Similar exemptions are contained in the Mortmain and Charitable Uses Act, 1888 (*y*). Some of the more important exceptions are, land not exceeding five acres towards providing a church, &c. (*z*), or any quantity of land not exceeding one acre, intended as a site for a school for the education of poor persons, or for the residence of the schoolmaster or schoolmistress, or otherwise for the purposes of the education of such poor persons in religious and useful knowledge (*a*). By the Literary and Scientific Institutions Act, 1854 (*b*), facilities were given for the

(*u*) 22 Q. B. D. at p. 311.

(*x*) 51 & 52 Vict. c. 42; see s. 13 (2).

(*y*) 51 & 52 Vict. c. 42; see s. 8. See the exemptions detailed in Tyssen on Charitable Bequests, ch. xxviii. p. 381

(*z*) 43 Geo. 3, c. 108. *Ante*, p. 93.

(*a*) 4 & 5 Vict. c. 38; 7 & 8 Vict. c. 37; 12 & 13 Vict. c. 49; 14 & 15 Vict. c. 24; 15 & 16 Vict. c. 49.

(*b*) 17 & 18 Vict. c. 112.

conveyance of not more than one acre of land to be used as a site for institutions established for the promotion of science, literature, and the fine arts, for adult instruction, the diffusion of useful knowledge, the foundation or maintenance of libraries or reading rooms for general use among the members or open to the public, of public museums and galleries of paintings and other works of art, collections of natural history, mechanical and philosophical inventions, instruments, or designs. Further provision has been made by an Act of 1868 (*c*), for the acquisition of two acres of land by societies or bodies of persons associated together for religous, educational, literary, scientific, or other like charitable purposes as sites for buildings for such purposes.

Under the Recreation Grounds Act, 1859 (*d*), any lands may be lawfully conveyed to trustees to be held by them as open public grounds for the resort and recreation of adults, and as playgrounds for children and youth. Under the Public Parks, Schools, and Museums Act, 1871 (*e*), it was permitted to give, and that even by will or codicil, land or personal estate to be applied in the purchase of land, to the extent of twenty acres for any one public park, two acres for any one public museum, and one acre for a school-house for an elementary school, provided only that the will or deed of the testator or grantor was made twelve months at least before his death, and enrolled in the books of the Charity Commissioners within six months next after the time when it should come into operation.

By the Places of Worship Sites Act, 1873 (*f*), any quantity of land not exceeding one acre, and not being part of a demesne or pleasure ground attached to any mansion-house, may be conveyed as a site for a church, chapel, meeting-house, or other place of divine worship, or for the residence of a minister officiating in such place of worship or in any place of worship within one mile of such site, or for a burial place, or any number of such sites, provided that each such site does not exceed the extent of one acre.

Under the Public Health Act, 1875 (*g*), any urban authority

(*c*) 31 & 32 Vict. c. 44, partially repealed and re-enacted by 51 & 52 Vict. c. 42.

(*d*) 22 Vict. c. 27.

(*e*) 34 Vict. c. 13, repealed and re-enacted by 51 & 52 Vict. c. 42.

(*f*) 36 & 37 Vict. c. 50, amended by 45 & 46 Vict. c. 21.

(*g*) 38 & 39 Vict. c. 55, s. 164. See *Att.-Gen.* v. *Corp. of Sunderland*, 2 Ch. D. 634, as to what buildings may be erected on lands acquired under the Act.

may purchase or take on lease lands to be used as public walks or pleasure grounds.

Rule against perpetuities.

Another restriction imposed by law on the alienation of property (*h*) is that the disposition shall not be contrary to what is called the "rule against perpetuities," which prescribes certain limits of time beyond which the acquisition or vesting of the absolute interest in, or dominion over, the property may not be postponed. The object of the rule is in part the same as that of the prohibition of alienation in mortmain; namely, to prevent the tying up of property in such a way as to withdraw it from ordinary transferability. If there were no "rule against perpetuities," "that free and active circulation of property, which is one of the springs as well as the consequences of commerce, would be obstructed; the improvement of land checked; its acquisition rendered difficult; the capital of the country gradually withdrawn from trade; and the incentives to exertion in every branch of industry diminished" (*i*). Another reason of it is the possible embarrassment to the State which might result from toleration of the excessive aggrandizement of some one single person or family. Were property allowed to be tied up and wealth to accumulate in any one line, or in any one possessor, the personal influence and power it would attract to itself might have a tendency to disturb, if not altogether to derange, the State itself: for, however desirable it is to encourage the general growth of wealth in a community, it might under some circumstances prove dangerous to allow any particular citizen to be put in that position of elevation above all others which might be the result of an unrestricted accumulation.

Hence, as a general principle of the law, no one can make any alienation or settlement of his property which would render the *corpus* (*k*) of it inalienable for a period longer than a life, or several lives, in being at the time of the gift, and twenty-one years afterwards; or, more accurately, twenty-one years with an allowance for a period of gestation, as it is termed, in cases where gestation exists (*l*). Thus, where it is sought to limit property after the expiration of some existing life to a person unborn at the date of the gift, as an ordinary rule it is necessary

(*h*) See *ante*, pp. 82, 85.

(*i*) Jarman on Wills, i. 250.

(*k*) *I.e.*, the property itself, as distinguished from the income or produce of it.

(*l*) *Cadell* v. *Palmer*, 7 Bligh, N. S. 202, H. of L. *Post*, p. 275.

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that that person should come into being at the latest within a period of twenty-one years from the expiration of the life in question; only in the case of a posthumous child, that is one begotten before, but not born till after, the termination of the life, the law allows a further period of the few months within which the child might be born.

A limitation which infringes the Rule against perpetuities is said to be "void for remoteness."

Remainder after estate tail.

The creation of an estate tail is not at variance with this principle; for though an estate tail unbarred may last for generations, it is always in the power of the tenant in tail to destroy the estate tail and acquire the fee simple. And the rule has never been considered to be binding on limitations subsequent to an estate tail, because such limitations have always been liable to destruction, formerly by a common recovery and now by the method provided by the Fines and Recoveries Act (*m*).

Remainder to child of unborn person.

It is sometimes said that no remainder can be too remote, but this is an error (*n*). It has in a very recent case (*o*) been laid down by the Court of Appeal that the rule of law still exists that where an estate for life is limited to an unborn person, a remainder cannot be limited (as to the legal estate) to a child of that unborn person; and that this rule is independent of the more modern rule against perpetuities, which prohibits the tying up of property for a longer period than a life or lives in being and twenty-one years afterwards.

So stringent is the rule against perpetuity, that a gift which may possibly exceed the prescribed limit is void, even though in the event it happens to vest absolutely within that limit. To take an instance: a testator gave his real and personal estate to trustees upon trust for his wife during widowhood, and after her death or second marriage for his children who might be living at such death or second marriage and the issue of any child who might have previously died, such issue to take the share of his or her deceased parent in equal shares, the share of such of his children or grandchildren as should be a son or sons to become vested in and payable to them as and when he or they should respectively attain the age of twenty-four years, and the shares of

(*m*) Challis, R. P. 146, citing *Nicolls* v. *Sheffield*, 2 Bro. C. C. 215; *Heasman* v. *Pearse*, L. R. 7 Ch. 275.

(*n*) *Re Frost*, 43 Ch. D. 246.

(*o*) *Whitby* v. *Mitchell*, 44 Ch. D. 85, affirming the decision of Kay, J., 42 Ch. D. 494. See this rule stated and discussed, Challis, R. P. 90.

his daughters or the female issue of any deceased child to be settled as therein mentioned. It will be seen a child might die in the lifetime of the widow, or before her second marriage, leaving a son under the age of one year; the widow might then die or marry, and such son might not attain twenty-four years within the period allowed by the rule. A will takes effect at the death of the testator, and any gift made by it is void for remoteness if it does not necessarily take effect within twenty-one years from the termination of any life then in being. Consequently, the whole of the gifts after the life interest of the widow were void for remoteness (*p*). In another case the testator gave a freehold estate to trustees and their heirs during the life of his daughter on trust for her and after her death to the use of any husband "whom she may hereafter marry" during his life with remainders over after the death of the survivor of the daughter and her husband; and it was held that, as the husband would not necessarily be born in the testator's lifetime, the remainders after the death of the survivor were too remote (*q*).

It will have been observed (*r*) that the rule applies as well to personal as to real estate.

Accumulation of income (Thellusson Act).

What has been said applies to the *corpus* of the property; and down to the year 1800 and the Act of King George III., popularly known as the Thellusson Act (*s*), the income of property might have been rendered inalienable, in other words, subject to the obligation of an accumulation, for a period commensurate with that within which the *corpus* might be tied up. All that the law required was that the accumulation should not exceed that limit. A certain Mr. Thellusson, however, who lived in the reign of George III., and was the possessor of a very ample fortune (his real estate was of the annual value of about £5,000, and the residue of his personal estate above £600,000), conceived the whimsical idea of swelling this in the possession of his posterity to an almost fabulous amount, by directing by his will the accumulation of the income of the whole of his vast property during the lives of all his children, grandchildren, and great grandchildren, who might be living at the time of his death, and the life of the survivor of them, for the benefit of some future descendants who should be living at the death of such survivor,

(*p*) *Hale* v. *Hale*, 3 Ch. D. 643, M.R.; and see *Pearks* v. *Moseley*, 5 App. Cas. 714.

(*q*) *Re Frost*, 43 Ch. D. 246.

(*r*) *Hale* v. *Hale*, *ubi sup.*

(*s*) 39 & 40 Geo. III. c. 98.

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and between whom the property and accumulations of income were then to be divided. It was computed, that supposing the survivor of the persons during whose lives the accumulation was to continue should live seventy years, the property at the end of that period, if improved at compound interest at the rate of five per cent., would have amounted to about nineteen millions sterling (*t*). This extraordinary bequest became the subject of litigation; but the validity of it was established as falling within the limits sanctioned by the existing state of the law. To prevent such mischievous dispositions in future, the Act in question, the 39 & 40 George III. c. 98, was passed; and it applies to the disposition of personal as well as of real estate. It enacts that no person by deed, will, &c., shall settle or dispose of any real or personal property, so that the rents or produce shall be wholly or partially accumulated for any longer term than (1) the life or lives of any such grantor or grantors, settlor or settlors; or (2) the term of twenty-one years from the death of any such grantor, settlor, devisor, or testator; or (3) during the minority or respective minorities of any person or persons who shall be living or in *ventre sa mère* at the time of the death of such grantor, devisor, or testator; or (4) during the minority or respective minorities only of any person or persons, who under the deed, will, &c., directing such accumulations would for the time being, if of full age, be entitled to the rents and profits. This does not allow an accumulation during the minority of a child unborn at the time when the instrument comes into operation (*u*). Where an accumulation is directed exceeding the limits allowed by the Act, the rents or produce, so long as they shall be directed to be accumulated contrary to the provisions of the Act, go to such person or persons as would have been entitled thereto if such accumulation had not been directed. This does not mean that they will go to the person entitled after the period for which the accumulation is directed. Thus (*x*), where a man devised an estate to trustees in trust for his wife for life, or until second marriage; and in case of second marriage directed the income to be

(*t*) *Thellusson* v. *Woodford*, 4 Vesey, 237.

(*u*) Lord Langdale, in seeking to construe this clause, alludes to the difficulty of attributing a distinct and efficient meaning to all the words of this Act; *Ellis* v. *Maxwell*, 3 Beavan, 596.

(*x*) *Weatherall* v. *Thornburgh*, 8 Ch. D. 261. See the rules as to the destination of income freed from accumulation by the Act stated in 1 Jarman on Wills, 311.

accumulated during the remainder of her life, and then gave the remainder with accumulations after her death to a stranger; the widow, having married again, and lived more than twenty-one years from the testator's death, it was held there was an intestacy as to accumulations during the period between twenty-one years from the testator's death and the death of his widow; and that, as the testator had no heir, the Crown took the income for the rest of the life of the testator's wife.

The Act authorizes accumulation during any of the four periods, and only for one of those periods; and therefore a direction in a will to accumulate the income of trust funds for twenty-one years after the testator's death, and at the expiration of that term during the minorities of the persons entitled under the trusts, was held to be good only for twenty-one years (*y*). The Act, however, does not apply to any provision for payment of debts, or for raising portions for children, or touching the produce of timber. If, however, the allowed term is exceeded (provided the case does not fall within the rule against perpetuities) the direction for accumulation is good *pro tanto* (*z*). As observed by Lord Brougham in 1855 (*a*):—

Exceptions from Act.

for so much.

"The Act" (which was drawn by Lord Loughborough) "has hardly ever been discussed in Courts either of law or equity, without the Judge having occasion to observe upon the inartificial, and in several respects ill-defined language in which its provisions are expressed."

Aliens.

There was, prior to the Naturalization Act, 1870 (*b*), a restriction on alienation, to which it will be proper to advert; and that is the prohibition which restrained any alienation of land (including leaseholds) in favour of one not owing allegiance to the Crown,—that is, to a foreigner, or, as he is technically termed, an "alien,"—restrained it at least practically, if not theoretically; since though it did not prevent an alien from acquiring an estate, it declared him incapable of holding it for his own

(*y*) *Wilson* v. *Wilson*, 1 Sim. N. S. 288; the Act is given *verbatim* at p. 295. See *Jagger* v. *Jagger*, 25 Ch. D. 729. Now it is sometimes unnecessary to give any directions for the accumulation of income during minorities, owing to the provisions of the Conveyancing Act, 1881, 44 & 45 Vict. c. 41, ss. 42, 43, as to the maintenance of infants and the accumulation of the surplus income. See 35 Solors. Journ. 150, 238.

(*z*) The Act has given rise to numerous questions in respect of which reference may be made to Hayes and Jarman on Wills, pp. 352—356, and the notes to the leading case of *Griffiths* v. *Vere* (reported 9 Ves. 127) in Tudor's Leading Cases on Real Property, p. 497.

(*a*) *Shaw* v. *Rhodes*, 1 M. & Cr. 141.

(*b*) 33 & 34 Vict. c. 14, amended by 33 & 34 Vict. c. 102, and 35 & 36 Vict. c. 39.

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benefit, and pronounced the estate forfeited to the Crown on the institution by the Crown of the requisite proceedings to avail itself of the forfeiture.

"If," says Lord Coke (*c*), "an alien purchase lands, he is of capacity to take a fee simple, that is, to become a purchaser, but not to hold."

These proceedings were a writ of inquisition or inquiry for the ascertainment of the facts of the conveyance, and of the alienage, and on the return to the inquisition, technically termed "office found," being made, the Crown was entitled to seize. In the meantime, however, until office found, a *primâ facie* title vested in the alien. He might even, in the event of his ouster, maintain an action of ejectment on his seisin, and might himself make a conveyance over to another, subject only to the rights of the Crown when established, and to a defeasance under them.

But by an Act passed in 1844, a lease taken by a subject of a friendly state for a term not exceeding twenty-one years, for the residence or occupation of himself or his servants, or for the purpose of any trade, business, or manufacture, was privileged, and not liable to forfeiture (*d*). And by the Naturalization Act, 1870—

S. 2. "Real and personal property of every description may be taken, acquired, held and disposed of by an alien in the same manner in all respects as by a natural-born British subject; and a title to real and personal property of every description may be derived through, from, or in succession to an alien, in the same manner in all respects as through, from, or in succession to a natural-born British subject" (*e*).

Lis pendens.

It has long been the doctrine of the Courts, both in equity and at common law (*f*), that during the pendency of a suit respecting them, any alienation of the lands must be subject to the decision

(*c*) Co. Litt. 2*b*, 117*a*.

(*d*) 7 & 8 Vict. c. 66, s. 5, and by s. 3 any person born of a mother "being a natural born subject of the United Kingdom" was enabled to hold real estate. On the old law as to the rights of the Crown on an alien purchasing lands, see Chitty on the Prerogative of the Crown, p. 229. As to *inquisition* or *inquest* of office, *ibid.* p. 246.

(*e*) 33 Vict. c. 14: but it is provided (s. 14) that nothing in the Act contained shall qualify an alien to be the owner of a British ship. The same Act deprived an alien of the right to be tried by a jury *de medietate linguæ*, but made him liable to be tried in the same manner as a natural-born subject; and enabled British subjects, where in a foreign State, and not under disability, voluntarily become naturalised in such State, to renounce their allegiance, that is to cease to be British subjects and become aliens.

(*f*) *Bellamy* v. *Sabine*, 1 De G. & J. 580, 584.

in the suit; in other words, neither party to the litigation can alienate the property in dispute so as to affect his opponent. The law does not allow litigant parties to give to others, pending the litigation, rights to the property in dispute, so as to prejudice the opposite party. This is called the doctrine of *lis pendens* (*g*).

"It is not founded," says Turner, L.J. (*h*), "upon any of the peculiar tenets of a Court of Equity as to implied or constructive notice. It is a doctrine common to the courts, both of law and of equity, and rests upon this foundation,—that it would plainly be impossible that any action or suit could be brought to a successful termination, if alienations *pendente lite* were permitted to prevail. The plaintiff would be liable in every case to be defeated by the defendant's alienating before the judgment or decree, and would be driven to commence his proceedings *de novo*, subject again to be defeated by the same course of proceeding."

To constitute a *lis pendens*, there must be a continuance of the proceedings; therefore if the action be ended, by judgment or otherwise, there is no *lis pendens* to affect the lands (*i*). A *lis pendens* formerly bound all persons whether they had notice of it or not: but by an Act for the protection of purchasers (*k*), provision was made for the registration and re-registration of the cause; and unless and until it is made, no purchaser or mortgagee is to be bound by a *lis pendens* unless he has express notice of it. There is to be registered a memorandum containing the name and abode, title, trade or profession, of the person whose estate is intended to be affected, and the Court of Equity, and the title of the cause. And as the registration of a *lis pendens* could not be vacated without the consent of the person by whom it was registered, and such consent was sometimes withheld although the suit or proceeding was at an end, or was not being *bonâ fide* prosecuted, it was enacted by 30 & 31 Vict. c. 47, s. 2, that the Court, before which the property sought to be bound is in litigation, may, upon the determination of the *lis pendens*, or during the pendency thereof, where the Court shall be satisfied that the litigation is not prosecuted *bonâ fide*, make an order for vacating the registration without the consent of the party who registered it (*l*).

(*g*) As to *lis pendens*, see Elph. & Cl. on Searches, p. 91; *Price* v. *Price*, 35 Ch. D. 297; Wms., R. P. 113; 2 Wh. & Tud. L. C. 75 *et seq.*

(*h*) In *Bellamy* v. *Sabine*, 1 De G. & J. at p. 584

(*i*) *Kinsman* v. *Kinsman*, 1 R. & M. 622, *per* Lord Lyndhurst, L.C.

(*k*) 2 & 3 Vict. c. 11, s. 7.

(*l*) See *Pooley* v. *Bosanquet*, 7 Ch. D. 541.

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Voluntary settlements.

—when irrevocable.

Further modifications of the ordinary law as to alienation arise under the law respecting voluntary conveyances or settlements, *i.e.*, alienations made otherwise than for valuable consideration (*m*). A voluntary conveyance or settlement if "executed," *i.e.* fully completed, is binding on the grantor or settlor himself, and cannot be undone by him unless he has expressly reserved a power to revoke it (*n*), or can establish a case upon which the Court will order it to be set aside; as, for instance, on the ground that he was induced to make it by undue influence (*o*), or that he did not understand the effect of what he was doing (*p*). But, though binding on the settlor (and those claiming under him as volunteers), a voluntary settlement may be ineffectual by virtue of the operation of certain statutes which we proceed to notice.

13 Eliz. c. 5. Creditors.

A statute of the reign of Elizabeth (*q*) avoids as against creditors all alienations or conveyances of lands or goods made with intent to delay, hinder, or defraud them; but the Act is not to extend to any estate or interest in lands or goods, on good, which means valuable, consideration and *bonâ fide* lawfully conveyed to any person not having notice of the fraud (*r*). This Act, it will be observed, applies to both real and personal property, and protects creditors. As to lands only, and for the protection of purchasers for value, a later statute of the same reign (*s*) provided that conveyances, charges, leases, &c., of

27 Eliz. c. 4. Purchasers.

(*m*) As to consideration, see *post*, Chap. XIV.

(*n*) *Paul* v. *Paul*, 19 Ch. D. 47; 20 Ch. D. 742. See for examples the cases of *Bill* v. *Cureton*, 2 My. & K. 503, where a voluntary settlement was made by an unmarried woman, and *Petre* v. *Espinasse*, 2 My. & K. 496, where the settlor was a bachelor. Though these settlements were not made in contemplation of marriage, they were held to be irrevocable. But it must be noted that this doctrine applies only where the trusts in favour of volunteers are fully executed: where they are executory only, *e.g.*, where there is only a contract or covenant to settle, a volunteer cannot enforce them; see *Re Anstis, Chetwynd* v. *Morgan*, 31 Ch. D. 596. To constitute an executed and irrevocable settlement there must be either a complete conveyance or transfer of the property, or a declaration by the settlor that he holds it in trust. See on this subject the notes to *Ellison* v. *Ellison* in 1 Wh. & Tud. L. C., and Watson, Comp. Eq. vol. i. pp. 300, 311 *et seq.*

(*o*) As to what is undue influence, see *Wingrove* v. *Wingrove*, 11 P. D. 81. As to parental influence, see *Wright* v. *Vanderplank*, 2 K. & J. 1; *Savery* v. *King*, 5 H. L. C. 627; as to dealings between a solicitor and his client, see *Savery* v. *King*, *ubi sup.*

(*p*) *Dutton* v. *Thompson*, 23 Ch. D. 278, is an illustration of such cases.

(*q*) 13 Eliz. c. 5, made perpetual by 29 Eliz. c. 5.

(*r*) This statute and the next are given in the notes to *Twyne's Case*, 1 Smith's L. Ca. 1.

(*s*) 27 Eliz. c. 4, made perpetual by 39 Eliz. c. 18.

lands, made with intent to defraud and deceive purchasers, and all conveyances with a clause of revocation at the grantor's pleasure (*t*), should be void against such purchasers. A settlement made in consideration of marriage, whether executed prior to marriage, or after marriage, but in pursuance of articles entered into before the marriage, is not within these statutes (*u*), for marriage is a valuable consideration. Many questions have arisen under these statutes, in respect of which reference may be made to *Twyne's case* (*x*). In that case, which arose under the statute 13 Eliz. c. 5, it was held that a conveyance of goods was void, because, though for good consideration, it was not *bonâ fide*, the debtor having been allowed to remain in possession; and the statute requires that there should be *bona fides* as well as good consideration (*y*). A presumption of intent to defraud is held to arise from the grantor remaining in possession of the property conveyed; but it is now held that it is a question of fact in each case whether the transaction was *bonâ fide* or was a contrivance to defraud creditors (*z*).

"As regards the statute 13 Eliz. c. 5, the rule was correctly laid down by the late Vice-Chancellor Kindersley in the case of *Thompson* v. *Webster* (*a*), in which he says:—'The principle now established is this: The language of the Act being that any conveyance of property is void against creditors if it is made with *intent* to defeat, hinder, or delay creditors, the Court is to decide in each particular case whether, on all the circumstances, it can come to the conclusion that the *intention* of the settlor in making the settlement was to defeat, hinder, or delay his creditors'" (*b*).

It may be added, that it has been held that a conveyance is not fraudulent and void, either under the statute 13 Eliz. c. 5, or at common law, merely because it is intended to defeat the expected execution of a particular creditor, provided that it was for valuable consideration and *bonâ fide*—*i.e.*, that it was the intention of both parties to buy and sell in reality (*c*).

(*t*) 27 Eliz. c. 4, s. 4.

(*u*) See 2 Prid. 230.

(*x*) 1 Smith's L. Ca. 1.

(*y*) See per Fry, J., *Re Johnson, Golden* v. *Gillam*, 20 Ch. D. at p. 393.

(*z*) 1 Sm. L. C. *Ib.* 13.

(*a*) 4 Drew. 632.

(*b*) *Godfrey* v. *Poole*, 13 App. Cas. 497, at p. 503; a case before the Judicial Committee of the Privy Council. In *Ex parte Mercer*, 17 Q. B. D. 290, the C. A. held that though a voluntary settlement may be void if the necessary consequence of it is to defraud creditors though there was no actual intention to defraud them, yet the intention is not necessarily to be inferred merely because it would have that consequence.

(*c*) *Wood* v. *Dixie*, 7 Q. B. 892; Elph. & Cl. Searches, 77.

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Both statutes, it will be observed, in terms refer to a conveyance of the property with intent to defraud. Under the statute 13 Eliz. c. 5, it has been decided that the mere fact of a settlement being voluntary is not enough to render it void against creditors; but there must be other circumstances proving a fraudulent intent; for instance, unpaid debts existing at the time of making the settlement; or the fact that the settlor was at the time, not necessarily insolvent, but so largely indebted as to induce the Court to believe that the intention of the settlement, taking the whole transaction together, was to defraud the creditors (*d*).

As to the statute 27 Eliz. c. 4, Cockburn, C.J. (*e*), said:—

"If its construction had been *res integra*, there has been no judge who, in modern times, has had to apply the statute, who would not probably have excluded from its operation family settlements made honestly and without any intention of defrauding creditors or future purchasers. The statute has seldom come under review without eliciting judicial observations on the forced and harsh construction put upon it by its first expounders; but its operation in avoiding in favour of purchasers for value, whether with or without notice, conveyances in favour of relations, however honest and otherwise praiseworthy, if made without valuable consideration, is now too firmly established to admit of being questioned; and it must now be taken as definitely settled that a provision even for a man's wife and children (*f*), however sacred in a moral point of view the duty of making such provision may be, is bad against a future purchaser, as being without consideration and voluntary."

But for a subsequent purchase to prevail against a voluntary conveyance, the vendor and the person who made the voluntary conveyance must be the same person. Therefore, a purchaser from the devisee of one who had made a voluntary conveyance in his lifetime, is not entitled, under 27 Eliz. c. 4, to "avoid" that voluntary conveyance (*g*). Lord Campbell, C.J., said:—

"The principle on which voluntary conveyances have been held uniformly to be fraudulent and void as against subsequent purchasers appears to be, that, by selling the property for a valuable consideration, the seller so entirely repudiates the former voluntary conveyance, and shows his intention to sell, as that it shall be taken conclusively, against him and the person to whom he conveyed, that such intention existed

(*d*) See *Holmes* v. *Penney*, 3 K. & J. 90, as to then creditors; and see *Jenkyn* v. *Vaughan*, 3 Dr. 419, as to subsequent creditors.

(*e*) In *Clarke* v. *Wright*, 6 H. & N. 870.

(*f*) *I.e.*, not being one made in consideration of the marriage: but a mere post-nuptial settlement, not in pursuance o ante-nuptial articles.

(*g*) *Doe* d. *Newman* v. *Rusham*, 17 Q. B. 723; *Godfrey* v. *Poole*, 13 App. Cas. 497.

when he made the conveyance, and that it was made in order to defeat the purchaser. Such deeds have been held fraudulent and void as against such purchasers, even when they have had notice of them (*h*). Where the same person executes the voluntary conveyance, and afterwards sells and conveys the property, the application of the principle is obvious and easy. But where the seller is a different person from him who executed the voluntary conveyance, it is quite otherwise; for the acts of one man cannot show the mind and intention of another (*i*)."

It is also held that a purchase from one to whom a voluntary conveyance has been made cannot be disturbed by a subsequent conveyance from the original settlor (*k*). "It follows," says Mr. Prideaux (*l*), "that a purchaser can seldom be advised to take a title from a person who has executed a voluntary settlement, (1), because the volunteer may have subsequently sold or mortgaged, and (2), because there may have been some other consideration not disclosed on the face of the settlement."

A consideration, however small, will take the case out of the statute (*m*). It was said by James, L.J., in *Price* v. *Jenkins* (*n*):

"If there is any valuable consideration for a settlement, the *quantum* of such a consideration is of no consequence under the Statute of Elizabeth."

In that case, the settlement was an assignment by a widower, on his second marriage, of leaseholds to trustees in trust for himself for life, and after his death for his son, who was one of the trustees. It was held that, as the trustees became liable for payment of rent and performance of the covenants of the lease, there was a valuable consideration sufficient to support the settlement against a subsequent purchaser (*o*).

Bankruptcy Act and voluntary settlements.

The rule avoiding voluntary settlements as against creditors was extended, in the case of traders, by the Bankruptcy Act,

(*h*) *Doe* d. *Ottley* v. *Manning*, 9 East, 59.

(*i*) This passage is cited with approval in *Godfrey* v. *Poole*, 13 App. Cas. 497, at p. 504.

(*k*) *George* v. *Milbanke*, 9 Ves. 190.

(*l*) Vol. ii. p. 258.

(*m*) 27 Eliz. c. 4.

(*n*) 5 Ch. D. 619, at p. 621. This case does not apply to 13 Eliz. c. 5: see *per* Jessel, M.R., *In re Ridler*, 22 Ch. D. 81; and it must not be assumed that if a man makes a settlement of a large freehold estate along with a small leasehold, the settlement would be held to be made for good consideration within the statute 13 Eliz. c. 5. (see *per* Jessel, M.R., *ibid.*).

(*o*) And see *In re Foster and Lister*, 6 Ch. D. 87, and *Teasdale* v. *Braithwaite*, 5 Ch. D. 630, where post-nuptial settlements of lands belonging to a wife were held to be for valuable consideration. It would seem that in cases within the Married Women's Property Act, 1882, the principle of these cases does not apply; see the remarks in Wolstenholme and Turner on the Conveyancing Acts, p. 181.

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1869 (*p*). The distinction between traders and non-traders is abolished by the Bankruptcy Act, 1883 (*q*), which contains (s. 47) a provision similar to that in the Act of 1869, except that, to support a voluntary settlement made within ten years of bankruptcy, it must now be shown that the settlor's interest passed to the trustee of the settlement on execution. The section referred to enacts that any settlement (that is, any conveyance or transfer) of property, not being (1) a settlement made before and in consideration of marriage; or (2) made in favour of a purchaser or incumbrancer, in good faith and for valuable consideration; or (3) a settlement made on or for the wife or children of the settlor, of property which has accrued to the settlor after marriage in right of his wife; shall, if the settlor becomes bankrupt within two years after the date of the settlement, be void as against the trustee in the bankruptcy, and shall, if the settlor becomes bankrupt at any subsequent time within ten years after the date of the settlement, be void against the trustee in bankruptcy, unless the parties claiming under the settlement can prove that the settlor was at the time of making the settlement able to pay all his debts without the aid of the property comprised in the settlement, and that the interest of the settlor in such property had passed to the trustee of such settlement on the execution thereof (*qq*).

Life estate determinable on life-tenant's bankruptcy, &c.

Neither the *corpus* nor the income of property can be effectually settled so as to confer upon any person a right to continue in the enjoyment of it after his bankruptcy. Nor can the *corpus* of any property be effectually settled upon a man (*r*) with a proviso that he shall have no power to alienate it, or that if he attempt to alienate it his interest shall cease; for such an attempted restriction on alienation would be held by our law to be void. But the law allows the income of property, whether his own (*s*) or that of another, to be settled on a person

(*p*) 32 & 33 Vict. c. 71, s. 91.

(*q*) 46 & 47 Vict. c. 52, s. 47; see also s. 29 (2).

(*qq*) See *Briggs* v. *Spicer*, 35 Solors. Journ. 261; W. N. 1891, 30.

(*r*) It is otherwise in the case of a woman; a restraint upon anticipation (*i.e.*, alienation) can be effectually imposed on a married woman; or if she be unmarried to arise on her marriage. But, even as to a woman, such a restraint, in a settlement of her own property, is invalid as against ante-nuptial creditors in cases falling within s. 19 of the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75).

(*s*) *Brooke* v. *Pearson*, 27 Beav. 181; *Knight* v. *Brown*, 9 W. R. 515; and see *Re Detmold*, 40 Ch. D. 585.

for life or *until* he shall attempt to alienate or encumber his interest in it, so that he will have what is called a determinable life interest in the income. And a similar interest may be limited to a person determinable on his bankruptcy, provided that the settled property did not belong to himself before the settlement; but a life interest in his own property cannot be made determinable on his bankruptcy (*t*).

Debts after death.

After the death of the debtor, any real property held for an estate in fee simple, of which he may die seised, is under the present state of the law available equally with his personal estate for the satisfaction of his debts, whether "specialty debts," or debts "by simple contract." A "specialty debt" is one secured by a bond, or other deed: and under the Conveyancing and Law of Property Act, 1881 (*u*), a covenant, and a contract under seal, and a bond or obligation under seal, though not expressed to bind the heirs, are to operate in law to bind the heirs and real estate of the person making the same. A "simple contract debt" is any debt not coming under the description of debts of record, (*e.g.*, judgment debts), or debts by specialty. Even an acknowledgment in writing would not constitute a debt a specialty, unless the writing were sealed and delivered as a deed; so that a liability contracted under a bill of exchange, for example, notwithstanding the formality of the instrument, does not amount to more than a simple contract debt. The estate of the debtor is subject after his death to the liability in question, whether in the hands of a devisee under a testamentary disposition, or of the heir in default of such disposition.

There was formerly a distinction between "specialty" and "simple contract" creditors of deceased persons, as to priority of payment, in favour of the former; but this distinction has been removed in respect of all persons dying on or after 1st January, 1870, by 32 & 33 Vict. c. 46 (commonly known as "Hinde Palmer's Act"). This statute, however, does not affect any lien, charge, or other security which any creditor may hold or be entitled to for the payment of his debts (*x*). In the case of any

(*t*) See Elph. Introd. 302; Dart, V. & P. 22; Wms. R. P. 115; 2 K. & E. 455, note (*e*).

(*u*) 44 & 45 Vict. c. 51, s. 59.

(*x*) Rent is a specialty debt within the meaning of the Act: *Shirreff* v. *Hastings*, 6 Ch. D. 610. A specialty creditor has an advantage over a simple contract creditor with regard to the operation of the Statutes of Limitation: see *post*, ch. XVI. and 2 Da. ii. 21; and under 11 Geo. IV. & 1 Will. IV. c. 47, the devisee or heir may be sued personally, and judgment obtained to the ex-

person dying insolvent, it is now provided by the Judicature Act, 1875 (*y*), that the same rules shall prevail as to the respective rights of secured and unsecured creditors, and as to debts and liabilities provable, as may be in force for the time being under the Law of Bankruptcy with respect to the estates of persons adjudged bankrupt. That is to say, under the Bankruptcy Act, 1883 (*z*), (as under the Bankruptcy Act, 1869 (*a*)), a creditor holding a specific security on the property of the bankrupt may (1) simply have recourse to his security; or (2), he may give it up and prove for his whole debt; or (3), he may realise the security, or give credit for the estimated value, and prove in respect of the balance due to him. The old rule in equity, as established in *Mason* v. *Bogg* (*b*), was that a secured creditor might prove for his whole debt, realise his security, and receive a dividend rateably with the other creditors of the deceased on the whole debt, paying over any surplus he might receive beyond the amount of his debt.

It was not until 1833 (*c*) that the lands of all deceased persons whether they descended or were devised, were made subject to the payment of all their debts, whether by specialty, or by simple contract, and not until 1869 (*d*) that the debts were made payable equally, no matter whether they were by specialty or by simple contract. Unless there is an express or implied charge for debts on the real estate of the testator, recourse must be had to the Chancery Division of the High Court, in order to make the real estate available as assets, or, when the estate does not exceed in value £500, it may be to the County Court within the district of which the deceased person had his last place of abode in England, or in which the executors or administrators, or any one of them, have their or his place of abode (*e*); but, if there is such charge, the devisee in trust, if any, of the whole interest of the testator in the estate, and if there is no such devisee in

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tent of the assets devolved. See note by Wolstenholme and Turner to Conveyancing Act, 1881, s. 59. See also *In re Illidge*, 27 Ch. D. 478, as to the right of retainer by heir or devisee in respect of a specialty debt.

(*y*) 38 & 39 Vict. c. 77, s. 10.

(*z*) 46 & 47 Vict. c. 52, s. 39, and Sched. ii. 9—17. See as to valuation of the security, *Ex parte Taylor*, 13 Q. B. D. 128, and *Ex parte Arden*, 14 Q. B. D. 121.

(*a*) 32 & 33 Vict. c. 71, s. 40.

(*b*) 2 M. & C. 443.

(*c*) 3 & 4 Wm. 4, c. 104.

(*d*) 32 & 33 Vict. c. 46.

(*e*) County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 67 (1), and s. 75 (3).

trust, the executor of the testator (*f*) may sell or mortgage for payment of debts.

Forfeiture.

Forfeiture for treason or felony which formerly took place on attainder (*g*) has been abolished since 1870 (*h*): A convict, however, cannot alienate or charge any property (*i*). During sentence it may be placed in the hands of an administrator, to be appointed by the Crown, reverting only to the convict or his representatives on completion of sentence, pardon, or death. The administrator, however, has full power to alienate the property, or to cause payment or satisfaction of any debts or liabilities to be made out of it (*k*).

It remains to notice the personal incapacities, with regard to alienation, of (1) infants; (2) idiots and lunatics; and (3) married women (*l*).

Infants.

Infants, that is, persons under twenty-one years of age, cannot make any conveyance or disposition of their lands so as to be absolutely binding on themselves; such transactions are voidable by them at their pleasure on attaining full age, or, if they are dead, by their heirs (*m*).

Where, however, the lands have descended, or been devised to an infant, and are required to be sold or mortgaged for payment of debts, the infant can convey under the direction of the Court for the purpose of making a title to the purchaser or mortgagee in the same way as a tenant for life can, where the lands have

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(*f*) As provided by 22 & 23 Vict. c. 35, ss. 14—18.

(*g*) See Tud. L. C. R. P. note to *A.-G.* v. *Sands*, pp. 785 *et seq.*, and for the old law as to alienation by traitors or felons, *ib.* 792. *Post*, chap. XIV.

(*h*) 33 & 34 Vict. c. 23.

(*i*) 33 & 34 Vict. c. 23, s. 8. This does not mean that he may not pay his debts, and he may be made bankrupt: see *Ex parte Graves*, 19 Ch. D. 1.

(*k*) 33 & 34 Vict. c. 23, s. 9. See Dart, V. & P. pp. 15, 16.

(*l*) See as to these disabilities, Pollock on Contract, ch. ii. pp. 50 *et seq.* (5th ed.).

(*m*) It was formerly said that an infant's conveyance is absolutely void, and not merely voidable (*i.e.*, valid until ome act is done to avoid it: see, as to the distinction between void and voidable, Pollock on Contract, 5th ed. pp. 8, 54): but the law as stated in the text was laid down by Lord Mansfield in *Zouch* v. *Parsons* (3 Burr. 1794, 1804); and, notwithstanding the dissent of Mr. Butler (see his remarks in his edition of Shep. Touch. 232, 233) was approved by Sir E. Sugden when L. C. of Ireland, in *Allen* v. *Allen* (2 Dr. & War. 307, 338), where the subject is fully discussed. And see *Burnaby* v. *Equitable Revers. Socy.*, 28 Ch. D. 416; Simpson on Infants, 2nd ed. pp. 7, 9, 17 *et seq.* But it would seem that the conveyance may be absolutely void in a case where it is necessarily to the infant's prejudice, as for instance where it is voluntary, but we are not aware of any decision as to the effect of a voluntary conveyance by an infant.

Chap. IV.

Infants' Settlement Act.

been devised in settlement (*n*). Also by 18 & 19 Vict. c. 43, a male infant of twenty, and a female of seventeen, can make a binding settlement on marriage, with the sanction of the Court, before or after the marriage (*o*); but it must be remembered that the Act does not remove the disability arising from coverture; and that therefore, in cases not falling within the Married Women's Property Act, 1882 (*p*), a post-nuptial settlement by a woman may be ineffectual (*q*).

No will made by any person under the age of twenty-one is valid (*r*).

Conveyancing Act, 1881.

Under the Conveyancing and Law of Property Act, 1881, the High Court has power to sell the fee simple estate of an infant; for this is a consequence of the enactment (*s*) that land to which an infant is entitled in fee simple shall be deemed to be a settled estate within the Settled Estates Act, 1877. Previously the Court could not sell the fee simple estate of an infant merely because it might be for the infant's benefit to sell it (*t*); it could only sell such lands as came within the definition of "settled estates," under the Act of 1877. By virtue of the same enactment (*u*) the same powers of leasing are given to the Court and to the infant's guardians as are conferred by the Settled Estates Act, 1877, in respect of settled estates. A power of leasing infants' fee simple estates existed previously under the Act 11 Geo. IV. & 1 Wm. IV. c. 65 (*x*), which is still in force (*y*).

Settled Land Act, 1882.

And now, as previously pointed out (*z*), under the Settled Land Act, 1882 (*a*), special provision is made that where an infant is absolutely entitled in possession to land, then, for the purposes of that Act, the land is settled land and the infant is to be deemed tenant for life thereof. And, whether he is thus deemed to be, or is in fact, tenant for life, the powers of a tenant for life under

(*n*) 11 Geo. IV. & 1 Wm. IV. c. 47, s. 11; *ib.* c. 65, ss. 12, 16 and 31; 2 & 3 Vict. c. 60; and 11 & 12 Vict. c. 87. See *ante*, p. 54.

(*o*) *In re Sampson & Wall*, 25 Ch. D. 482: but the Court cannot compel the infant to make a settlement; *In re Leigh*, 40 Ch. D. 290.

(*p*) 45 & 46 Vict. c. 75.

(*q*) *Seaton* v. *Seaton*, 13 App. Cas. 61.

(*r*) Wills Act (1 Vict. c. 26), s. 7.

(*s*) 44 & 45 Vict. c. 41, s. 41; and see ss. 42 & 43 as to management of the land during infancy and receipt and application of income.

(*t*) See Dart, V. & P. p. 2.

(*u*) 44 & 45 Vict. c. 41, s. 41.

(*x*) See *In re Letchford*, 2 Ch. D. 719.

(*y*) The powers of leasing given by this Act are, it is believed, available in some cases which are not provided for by the Settled Estates Act, 1877, or the Settled Land Acts.

(*z*) *Ante*, p. 54.

(*a*) 45 & 46 Vict. c. 38, s. 59.

the Act may be exercised on his behalf by the trustees of the settlement, and, if there are none, then under the direction of the Court (*b*).

Lunatics.

Voluntary conveyances by idiots or lunatics (except during lucid intervals) are absolutely void (*c*); and such persons are, of course, incapable of disposing of property by will (*d*). But it appears to be now settled that a conveyance by an idiot or lunatic for valuable consideration is valid, if the purchaser had no notice of the idiotcy or lunacy (*e*); and that, even if he had such notice, the conveyance is not absolutely void, but is voidable by the lunatic's committee, or by his heirs after his death, or (probably) by himself if he recovers (*f*). Statutes, however, have been passed (*g*) empowering the Lord Chancellor, or the committees of idiots and lunatics (*i.e.*, those to whom their charge has been committed) to execute instruments in their behalf, where loss or disadvantage would otherwise be sustained by their incapacity to execute for themselves. These statutes (known as the Lunacy Regulation Acts) have been repealed by the Lunacy Act, 1890 (*h*), which contains similar provisions.

Trustee Acts.

Under the Trustee Act, 1850 (*i*), and the Trustee Act Extension Act, 1852 (*k*), the Chancery Division of the High Court (*l*), in the case of infants, and under the Lunacy Act, 1890 (*m*), the Judge in Lunacy (*n*) in the case of lunatics, may by order, where an infant or lunatic is possessed of any lands upon trust, or by way of mortgage, vest them in such person and for such estate as the Court or the Judge in Lunacy, as the case may be, shall direct.

(*b*) *Ibid.* s. 60.

(*c*) *Elliot* v. *Ince*, 7 D. M. & G. 475.

(*d*) As to the tests of mental capacity and generally, see *Smith* v. *Tebbitt*, L. R. 1 P. & M. 398.

(*e*) *Elliot* v. *Ince*, 7 De G. M. & G. 475; *Molton* v. *Camroux*, 4 Ex. 17.

(*f*) See Dart, V. & P. p. 6; Pollock on Contract, 87 *et seq.*

(*g*) 16 & 17 Vict. c. 70; 18 & 19 Vict. c. 13; 25 & 26 Vict. c. 86; and 45 & 46 Vict. c. 82.

(*h*) 53 Vict. c. 5; see ss. 116 *et seq.*; and as to execution of assurances, s. 124.

(*i*) 13 & 14 Vict. c. 60, ss. 3, 4, and 78.

(*k*) 15 & 16 Vict. c. 55.

(*l*) Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 34 (3).

(*m*) 53 Vict. c. 5 (s. 135), which Act repeals the former provisions as to lunatics contained in the Trustee Act, 1850, and the Extension Act of 1852.

(*n*) *Ib.* s. 108, which provides that "the jurisdiction of the Judge in Lunacy is to be exercised either by the Lord Chancellor for the time being entrusted by the Sign Manual of Her Majesty with the care and commitment of the custody of the persons and estates of lunatics, acting alone, or jointly with any one or more of such Judges of the Supreme Court as may for the time being be entrusted as aforesaid, or by any one or more of such Judges as aforesaid."

Chap. IV.

Married women.

With regard to the incapacity of married women to alienate land, we will first consider the law as to cases not falling within the Married Women's Property Act, 1882 (*o*).

Lord Mansfield, speaking of the Common Law as it then stood, said, in *Zouch* v. *Parsons* (*p*):—

"The distinction between the deeds of *femes covert* and of infants is important; the first are void, the second voidable."

To understand the law on this subject as it stood before the Married Women's Property Act, 1882, it is necessary to explain the different estates which a married woman might have in lands held in fee simple:—(1) The legal estate in them might have been conveyed or devised or have descended to her in fee, in which case her husband became seised of them in her right; or (2) she might have an ordinary equitable estate, as when they have been conveyed or devised to trustees in fee in trust for her in fee, without any words creating a separate use; or (3) she might have that peculiar equitable estate called a "separate estate," as when the lands had been conveyed or devised to trustees in fee for her separate use, or to herself direct in fee for her separate use (in which case the Court has hitherto constituted her husband a trustee).

Operation of fine on estate of married women.

Now at common law it was established "that a married woman by joining with her husband in levying a fine, might bar herself and her heirs of all her estate and interest in any lands whereof he was seised in her right" (*q*). It was, however, a consequence of a provision in the statute, *De modo levandi fines* (*r*), that she must be separately examined to see that she assented to the fine (*s*). A recovery might also be employed as a means of conveying the estate of a *feme covert* (*t*); but in practice was only resorted to where an estate tail was to be barred (*u*). The operation of fines and recoveries upon the estates of a married woman was derived from the principle that she might at common law be joined as a co-defendant with her husband in an action at law (*x*).

(*o*) 45 & 46 Vict. c. 75.

(*p*) 3 Burr. at p. 1805.

(*q*) See 5 Cruise, Dig. pp. 172 *et seq.*; Co. Litt. 121*a*, Mr. Hargrave's note (1).

(*r*) 18 Edw. I. stat. 4.

(*s*) 5 Cruise, Dig. 116; Challis, R. P. 319, 320.

(*t*) 4 Cruise, Dig. 128; 5 *ib.* 347.

(*u*) Challis, R. P. 319.

(*x*) Challis, R. P. 319; 5 Cruise, Dig. 116; *ib.* 172.

In a recent case in the House of Lords (*y*), Lord Selborne, L.C., remarked:—

"The common law of this country, as to the disabilities of married women, was not (as I conceive) founded on any presumption against the spontaneity or freedom of acts done by the wife when under marital control; nor was it subject to exception whenever there might be circumstances sufficient to repel such a presumption. The principle of the disability of coverture was that stated by Littleton (s. 168): 'A man and his wife are but one person in the law,' which is the reason why 'a man cannot grant or give his tenements to his wife during the coverture;' and (as Lord Coke says in his comment on the same place) 'she is disabled to contract with any without the consent of her husband; *omnia quæ sunt uxoris, sunt ipsius viri.*' As to her personal property in possession, the husband had absolute power without any concurrence on her part, and also as to the administration and usufruct of her real estate. By personal contracts, either with him or with any other person, she could in no way bind herself. Equity, in later times, through the medium of trusts, enabled her to acquire separate estate, and to deal with such separate estate as if she had been a *feme sole*, except when restrained from anticipation by the terms of the trust; in which case she continued under disability as to the *corpus* and future income of such property, though the *jus mariti* was excluded . . . Although a married woman could not contract or convey property (not separate) except so far as by common or statute law, she was enabled to join with her husband in doing so, she might always, when her interest required it, sue and be sued jointly with her husband, or (in equity) apart from her husband by a next friend. In respect of all interests which she had in the subject-matter of any such suit, she was bound as much as if she had been under no disability, by the powers of the Courts, and by the rules and principles of law and equity administered by them. Real estate, of which she or her husband in her right might be in possession, could be recovered against her as well as against her husband. . . . . It was therefore a just corollary from her right to sue, and her liability to be sued, in such a case, that she might elect, and be bound by her election, unless the nature of her interest in any property to be relinquished created some obstacle. . . . Another consequence of the *locus standi in curiâ* of a married woman for the purpose of asserting or defending her rights of property (whether with her husband or a next friend) and of having the rights of others asserted against her, was that her interests in the subject-matter of the litigation to which she was so made a party, might be bound by way of 'transaction' or compromise; and this has been in modern times extended to compromise out of, as well as in, Court. It was on this foundation that the forms of judicial assurance, by which freehold estates of married women were alienated at common law, down to the passing of the Act for the Abolition of Fines and Recoveries (*z*), originally rested" (*a*).

(*y*) *Cahill* v. *Cahill*, 8 App. Cas. 420; see pp. 425, 427.

(*z*) 3 & 4 Wm. 4, c. 74.

(*a*) See also the remarks of Lord Blackburn in the S. C. 8 App. Cas. at p. 438.

Chap. IV.

Fines and Recoveries Act —Conveyance by deed acknowledged.

The Act for the Abolition of Fines and Recoveries (*b*) enabled married women to convey by the method prescribed in the Act: but they have no power of alienation with respect to real estate (not separate) except such as is given by statute and the power thereby given is conditional on its execution in the manner which the statute prescribes (*c*). The Act provides for the alienation of lands belonging to a married woman for a legal estate or an ordinary equitable estate not for her separate use (in which case equity follows the law). She can by virtue of the Act alienate such estates *inter vivos* during coverture, but only with the concurrence of her husband, signified by his joining in the conveyance (*d*), and by deed duly acknowledged, *i.e.*, she must give her assent before a judge of the superior courts, or of a county Court, or (before 1883) two commissioners, or (after 1882) one commissioner, after separate examination as to her knowledge of what she is doing and her wish to do it (*e*).

Concurrence of husband and acknowledgment by wife.

Certificates of acknowledgment.

It was held that the Act for the Abolition of Fines and Recoveries (*f*) required that a certificate of the acknowledgment should be filed of record before any use could be made of the document; that the meaning of the Act was that the certificate, when filed, should have relation back to the date of the acknowledgment, when it should itself take effect; but that if the certificate were not filed, then the acknowledgment should not have any effect whatever (*g*). It has, however, been enacted by the Conveyancing Act, 1882 (*h*), that (as regards deeds executed by married women after 1882) where the memorandum of acknowledgment purports to be signed by a person authorised to take the acknowledgment, the deed shall, as regards the execution thereof by the married woman, take effect at the time of acknowledgment, and shall be conclusively taken to have been duly acknowledged. But a certificate must still be filed in the Supreme Court of the acknowledgment by a married woman of a deed executed before 1883, and an office copy of any certificate is

Conveyancing Act, 1882.

(*b*) 3 & 4 Wm. IV. c. 74, ss. 77—91.

(*c*) *Per* Ld. Selborne, 8 App. Cas. 428.

(*d*) See form of conveyance in Dav. Conc. Prec. p. 104.

(*e*) Act for the Abolition of Fines and Recoveries (3 & 4 Wm. IV. c. 74), ss. 77, 79, 80; County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 184; Conveyancing Act, 1882 (45 & 46 Vict. c. 39), s. 7. See as to the effect of acknowledgment and separate examination, *Tennent* v. *Welch*, 37 Ch. D. 622.

(*f*) 3 & 4 Wm. IV. c. 74, s. 86.

(*g*) *Jolly* v. *Handcock*, 7 Ex. 320; *Sharpe* v. *Foy*, L. R. 4 Ch. 35.

(*h*) 45 & 46 Vict. c. 39, s. 7.

to be received as evidence of the acknowledgment (*i*). Formerly, as we have seen, the mode of alienation by a married woman was by fine duly levied in the Court of Common Pleas, she being examined apart from her husband, to ascertain whether she joined in the fine of her own free will.

Legal estate—equitable estate.

At common law, by the marriage, the husband acquires a freehold interest during the joint lives of himself and his wife in land belonging to her in fee simple (not for her separate use), and is entitled to its rents and profits, and the husband's interest passes by the deed of the husband alone (*k*). The wife is under an absolute incapacity during coverture to dispose of such lands by will. By the 14th section of the Statute of Wills (*l*), it was enacted that wills or testaments, made of any manor, lands, tenements, or other hereditaments, by any woman covert should not be taken to be good or effectual in law; and the Wills Act (*m*) made no difference in this respect (*n*). But over lands which are her separate estate, she has the same power of disposition by deed or will as if she were a *feme sole*, so far as relates to the equitable or beneficial interest therein. Lord Westbury, L.C., said:—

Alienation of separate estate.

"When the Courts of Equity established the doctrine of the separate use of a married woman, and applied it to both real and personal estate, it became necessary to give the married woman, with respect to such separate property, an independent personal status, and to make her in equity a *feme sole*. It is of the essence of the separate use that the married woman shall be independent of and free from the control and interference of her husband. With respect to separate property, the *feme covert* is, by the form of trust, released and freed from the fetters and disability of coverture, and invested with the rights and powers of a person who is *sui juris*. To every estate and interest held by a person who is *sui juris*, the common law attaches a right of alienation, and accordingly the right of a *feme covert* to dispose of her separate estate was recognised and admitted from the beginning, until Lord Thurlow devised the clause against anticipation. But it would be contrary to the whole principle of the doctrine of separate use, to require consent or concurrence of the husband in the act or instrument by which the wife's separate estate is dealt with or disposed of; that would be to make her subject to his control and interference. The whole lies between a married woman and her trustees: and the true theory of her alienation is, that any instrument, be it deed or writing, when signed by her, operates as a

(*i*) 45 & 46 Vict. c. 39, s. 7, §§ 6, 7.

(*k*) *Robertson* v. *Norris*, 11 Q. B. 916. As to the three ways in which her fee simple may be affected by a trust for her separate use, see *per* Fry, L. J., *Dye* v. *Dye*, 13 Q. B. D. 156.

(*l*) 34 & 35 Hen. VIII. c. 5.

(*m*) 1 Vict. c. 26.

(*n*) S. 8. See *Willock* v. *Noble*, L. R. 8 Ch. 778; L. R. 7 H. L. 580.

direction to the trustees to convey or hold the estate according to the new trust which is created by such direction. This is sufficient to convey the *feme covert's* equitable interest; when the trust thus created is clothed by the trustees with the legal estate, the alienation is complete both at law and in equity" (*o*).

In the case just cited, the legal estate was in a trustee, and the remarks of Lord Westbury applied only to the wife's power over the equitable estate; for the wife's conveyance, even where she is entitled for her separate use (otherwise than under the Married Women's Property Act, 1882), does not affect the legal estate. If the legal estate is in trustees, they must join to convey it: if the husband is seised of it in right of his wife, the husband and wife must both be conveying parties, and the deed must be acknowledged by her to pass the legal estate (*p*).

Appointment by married woman.

Where real estate is limited to such uses as a married woman shall appoint, then, by a conveyance operating as an appointment of the use, she can convey alone by deed unacknowledged (*q*); or she can execute the power by will: and in such cases her appointment vests the legal estate in the appointee.

What is said as to legal and equitable estates will be clearer after we have dealt generally with such estates, and the distinction between them, and with uses and trusts (*r*).

Married Women's Property Act, 1882.

In cases where the wife is entitled by virtue of the Married Women's Property Act, 1882 (*s*), her conveyance operates to pass the legal estate as well as her beneficial interest; for the Act provides that a married woman shall, in accordance with the provisions of the Act, be capable of acquiring, holding, and disposing by will (*t*), or otherwise, of any real or personal property as her separate property, in the same manner as if she were a *feme sole*, without the intervention of any trustee. And (*u*) that every woman married *after* 1882 shall be entitled to have and to hold as her separate property, and to dispose of in manner aforesaid, all real and personal property which shall belong to her at mar-

(*o*) *Taylor* v. *Meads*, 4 De G. J. & S. 597 at page 603.

(*p*) See 1 K. & E. 520, note (*b*).

(*q*) 2 Da. i. 242.

(*r*) Ch. X., *post*.

(*s*) 45 & 46 Vict. c. 75, s. 1. See, as to the effect of this section, *Re Cuno, Mansfield* v. *Mansfield*, 43 Ch. D. 12.

(*t*) This power does not enable her by a will made during coverture to dispose of property not acquired until after the death of her husband; see *Re Price, Stafford* v. *Stafford*, 28 Ch. D. 709.

(*u*) S. 2. This applies to the power to enlarge a base fee into a fee simple absolute; *Re Drummond and Davies* (1891), 1 Ch. 524.

riage, or shall be acquired by or devolve upon her after marriage. Also (*v*), that every woman married *before* 1st January, 1883, shall be entitled to have and to hold, and to dispose of in manner aforesaid, as her separate property, all real and personal property, her title to which, whether vested or contingent, and whether in possession, reversion, or remainder, shall accrue *after* 1882. But these provisions are not to "interfere with or affect any settlement," whether made before 1883 or after 1882 (*x*). The words "interfere with or affect" mean "invalidate or render inoperative" (*y*). The above Act was passed to consolidate and amend the previous Acts relating to the property of married women—namely, the Married Women's Property Act, 1870, and the Amendment Act, 1874 (*z*). By the Act of 1870, it had been enacted (*a*), that when any freehold, copyhold, or customaryhold property should descend (*b*) upon any woman married after 9th August, 1870, as heiress, or co-heiress of an intestate, *the rents and profits* of such property should, subject and without prejudice to the trusts of any settlement affecting the same, belong to her for her separate use. The better opinion was, that that Act (unlike the Act of 1882) affected only the income of the property and not the fee simple (or *corpus*), and therefore that she had no power to dispose of it during coverture by will, or otherwise than by an acknowledged deed (*c*).

In a case arising under the Married Women's Property Act,

(*v*) S. 5. (*x*) S. 19.

(*y*) *Per* Lindley, L. J., *Re Armstrong, Ex parte Boyd*, 21 Q. B. D. at 270. It must however be remembered that where the marriage was before 1883, the husband on marriage became entitled to the rents and profits of the wife's freeholds during their joint lives, that on the birth of any issue who could by any possibility inherit, he became tenant by the curtesy, and that according to the custom of most manors he took similar interests in his wife's copyholds, and that he became entitled to, or to dispose of, his wife's personalty with some exceptions, and therefore that a settlement by him alone bound the wife to the extent of the interests taken by him, or which he could dispose of, *Hancock* v. *Hancock* 38 Ch. D. 78. Elph. Introd. 266. On the other hand where the marriage is after 1882 the husband takes no interest in the wife's property, except on her death intestate, and therefore a settlement by him alone does not bind her.

(*z*) 33 & 34 Vict. c. 93, and 37 & 38 Vict. c. 50.

(*a*) 33 & 34 Vict. c. 93, s. 8.

(*b*) Observe that the Act does not apply to lands *devised* to her, but only to those which she takes under an intestacy.

(*c*) 2 Da. i. 268. As to the different laws now applicable to a married woman, and the effect of the M. W. P. Act, 1882, see Wolstenholme and Turner's Conveyancing Acts, pp. 180 *et seq.*; they point out (p. 10), that the Act affords no assistance in the disposition by a woman married before 1883 of property acquired by her before that year. See also 1 K. & E. pp. 518 *et seq.*

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1870 (*d*), James, L.J., thus referred to the state of the law prior thereto :—

"In former years, and down to times within my recollection, judges of what used to be the Common Law Courts of this realm delighted in applying rigidly and strictly a series of rules and maxims which their predecessors had delighted themselves in devising, although they did not always commend themselves to the apprehension of the million. Amongst those maxims was one by which a married woman was held incapable of taking a gift, either from her husband or from a stranger—holding that in the one case it remained, and in the other became, the husband's property. But the Court of Chancery (a very great Court in its day, although it has now ceased to exist) invented that blessed word and thing, 'the separate use of a married woman,' and as that Court never allowed itself to be impeded or obstructed by mere technicalities, it provided that whenever it was necessary, and so far as it was necessary to give effect to that separate use of a married woman, the husband should be made a trustee of whatever property came to him in his marital right which ought to be so held."

By the Married Women's Property Act, 1882 (*e*), provision is made more fully than in the Act of 1870 (*f*), for any question between husband and wife as to the title to or possession of property being decided by application in a summary way to a judge of the High Court, or, at the option of the applicant, to the judge of the County Court of the district in which either party resides. Also, it is provided (*g*), that every married woman shall have in her own name against all persons, including her husband, the same civil remedies, and also (with some restriction as regards her husband) the same remedies and redress, by way of criminal proceedings, for the protection and security of her own separate property as if it belonged to her as a *feme sole* (*h*).

Restraint on anticipation.

In order to protect the wife against the influence and persuasion of her husband to exercise her unfettered power of disposition over her separate estate in his favour, and otherwise to preserve the benefit to her, in instruments conferring a separate estate or interest on a married woman, a clause is often introduced restraining during coverture her power of alienation, or anticipation of the income. This was first done by Lord Thurlow at the end of the last century, upon the theory that equity, making her the owner

(*d*) *Ashworth* v. *Outram*, 5 Ch. D. 941.

(*e*) 45 & 46 Vict. c. 75, s. 17.

(*f*) 33 & 34 Vict. c. 93, s. 9.

(*g*) 45 & 46 Vict. c. 75, s. 12.

(*h*) As to whether the wife has right to exclude her husband from her house, which is her separate property, see *Symonds* v. *Hallett*, 24 Ch. D. 346. She can sue a stranger for trespass, *Weldon* v. *De Bathe*, 14 Q. B. D. 339.

and enabling her as a married woman to alien, might limit her power (*i*); and since that time it has been usual to introduce into wills and settlements a clause giving to women (*j*) real and personal estate for their separate use independently of their husbands, without power of assignment by way of anticipation or of alienation (*k*); the effect of which is that nothing done or omitted to be done by the married woman at any given time deprives her of the right to receive from the trustees the next and every succeeding payment of the income as it becomes due (*l*). The clause, however, while restraining her acts *inter vivos*, does not interfere with her free power of disposition by will (*m*). It is provided by the Married Women's Property Act, 1882 (*n*), that no restriction against anticipation contained in any settlement or agreement for a settlement of a woman's own property to be made or entered into by herself, shall have any validity against debts contracted by her before marriage (*o*). It has been held that the restriction does not extend to prevent a married woman, equitable tenant in tail under a will to her separate use of freehold lands, "without power of alienation or

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(*i*) *Brandon* v. *Robinson*, 18 Ves. 434, and *Tullett* v. *Armstrong*, 1 Bea. 22, *per* Lord Langdale, M.R.; on appeal, Lord Cottenham, L.C., 4 M. & Cr. 377.

(*j*) Whether at the time married or not; for though trusts for separate use and the restraint on alienation, &c., would have no effect before marriage, yet they come into operation upon marriage, and exist during the coverture (*Tullett* v. *Armstrong*, 1 Beav. 1; and see *Hawkes* v. *Hubback*, L. R. 11 Eq. 5). "The restraint is annexed to the separate estate only; and the separate estate has its existence only during coverture: whilst the woman is discovert, the separate use, whether modified by restraint or not, is superseded and has no operation, though it is capable of arising on the happening of a marriage. The restriction cannot be considered distinctly from the separate estate of which it is only a modification;" *Woodmeston* v. *Walker*, 2 R. & M. 197.

(*k*) Lord Langdale, *Tullett* v. *Armstrong*, 1 Beav. 22.

(*l*) Per Fry, L. J., *Re Vardon's Trusts*, 31 Ch. D. at 280.

(*m*) *Baggett* v. *Meux*, 1 Coll. p. 151. The restraint may apply not only to a life interest, but to a separate interest given to a married woman absolutely, S. C., and see *per* Cotton, L.J., *In re Bown*, 27 Ch. D. 422, and see *Re Currey*, *Gibson* v. *Way*, 32 Ch. D. 361. See generally on the subject of married women's separate estate, *Hulme* v. *Tenant*, 1 Wh. & Tud. L. C.; and see form, 3 Da. ii. 798, or 2 Prid. 247; and as to the words to create it, other than 'separate,' which has *per se* a technical signification, see Elph. N. & C., Interp. 296. The words must shew the intention to secure the property against the control of the husband and to give to the wife the sole and absolute disposition, see *Massy* v. *Rowen*, L. R. 4 H. of L. 288.

(*n*) 45 & 46 Vict. c. 75, s. 19.

(*o*) See as to cases under the M. W. P. Act of 1870, *London & Provincial Bank* v. *Bogle*, 7 Ch. D. 773; *Axford* v. *Reid*, 22 Q. B. D. 548; and as to the Act of 1882, *Jay* v. *Robinson*, 25 Q. B. D. 467.

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anticipation" (*p*), from barring the entail with the concurrence of her husband, and limiting the property in fee to her separate use (*q*). It was argued, in the case referred to, that the restraint attached to the whole estate of the woman; but it was decided that there was no restraint except as regarded the income of her life estate. But, assuming that the argument was right, and that the fetter was on the whole estate, Jessel, M.R., said in *Cooper* v. *Macdonald* (*q*):—

"What is the meaning of the fetter? The meaning is exactly that which was expressed by the old common form of conveyancers, 'so as in nowise to deprive herself of the benefit thereof by way of anticipation.' The meaning was to give the actual enjoyment to the married woman for her own benefit, not for the benefit of anybody else; and it is absurd, it appears to me, to extend such an equitable provision as this so as to prevent a married woman enlarging the estate tail into an estate in fee simple for her own benefit. That is not an alienation so as to deprive herself of anything; it is not, strictly speaking, perhaps, an alienation at all, except in a very wide sense of the term. It is, strictly speaking, what is always called an enlargement of the estate. The mode in which it is done is by a conveyance which is called an alienation, but it is really nothing more than making that estate already given to the married woman indefeasible. If that is so—and all the clauses or fetters on alienation, if applying to the estate tail, would equally apply to the pure fee simple—why should I construe that clause against anticipation, which was invented by a Lord Chancellor for the benefit of a married woman, to her damage and injury?

"It appears to me that would be a wrong construction, and altogether opposed to principle. That would amount to saying that that clause which was intended to give her the full benefit of the property is to deprive her of the right of extending that benefit in her own favor, and I entirely decline so to construe the clause against my own views, had it been even more extensive than it appears to me to be in this will."

Conveyancing Act, 1881.

Now under the Conveyancing and Law of Property Act, 1881, notwithstanding that a married woman is restrained from anticipation, the High Court may, if it thinks fit, where it appears to the Court to be for her benefit, by judgment or order with her consent, bind her interest in any property (*r*). It had before this

(*p*) See *In re Bown, O'Halloran* v. *King*, 27 Ch. D. 411, 414, where Kay, J., said: "A clause restraining anticipation is construed as meaning that the married woman shall not assign her interest; whether the words are without any power of 'alienation' or of 'anticipation,' the effect is the same"; and this was cited with approval by Chitty, J., in *Re Currey, Gibson* v. *Way*, 32 Ch. D. 561, 365.

(*q*) *Cooper* v. *Macdonald*, 7 Ch. D. 288.

(*r*) 44 & 45 Vict. c. 41, s. 39; and see *Hodges* v. *Hodges*, 20 Ch. D. 749; *Re Little*, 40 Ch. D. 418; and the cases

Act been held that the Court had no power to interfere—*e.g.*, where a testator gave a legacy to a married woman upon condition that she should give up an estate devised to her by another testator for her separate use, with a clause against anticipation—though to have done so would have been greatly to her benefit (*s*).

Settled Land Act, 1882.

It has been mentioned before (*t*), that special provision has been made by the Settled Land Act, 1882 (*u*), for the case of a married woman being tenant for life within the meaning of that Act. The meaning of "separate estate" and "restraint on anticipation" having been now explained, the details of that provision will be more readily understood. It enacts that "where a married woman who, if she had not been a married woman, would have been a tenant for life, or would have had the powers of a tenant for life" under the Act, "is entitled for her separate use, or is entitled, under any statute, passed or to be passed, for her separate property, or as a *feme sole*, then she, without her husband, shall have the powers of a tenant for life" under the Settled Land Act; and, where she is entitled otherwise, she and her husband together are to have such powers. And she may execute all deeds, instruments and things necessary or proper for giving effect to the provisions of the section; and a restraint on anticipation is not to prevent the exercise by her of any power conferred on her by the Act.

Vendor and Purchaser Act, 1874.

By the Vendor and Purchaser Act, 1874, it was provided that where any freehold or copyhold hereditament should be vested in a married woman as a bare trustee, she might convey the same as if she were a *feme sole* (*v*).

Liability to engagements.

In equity a married woman's separate estate (that is, such separate estate, not subject to restraint on anticipation, as she had at the time of contracting the engagement) could be made liable to her general engagements (including tradesmen's bills, &c.), made in reference to and on the faith or credit of that estate (*x*),

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collected in Hood and Challis on the Conveyancing, &c., Acts, 3rd ed., p. 105.

(*s*) *Robinson* v. *Wheelwright*, 6 De Gex M. & G. 535. As to the effect of restraint upon alienation in regard to the equitable doctrine of election, see *In re Wheatley*, 27 Ch. D. 606, and *In re Vardon's Trusts*, 31 Ch. D. 275.

(*t*) *Ante*, p. 54.

(*u*) 45 & 46 Vict. c. 38, s. 61.

(*v*) 37 & 38 Vict. c. 78, s. 6; *Re Docwra*, 29 Ch. D. 693.

(*x*) *Johnson* v. *Gallagher*, 3 De G. F. & J., 494; and see *Pike* v. *Fitzgibbon*, 17 Ch. D. 454, which decided that the engagement does not bind separate estate acquired after the date of the engagement,

whether the reference to her separate estate was express or merely implied from the circumstances being such as to lead to the conclusion that she was contracting not for her husband but for herself in respect of her separate estate (*y*). But not even in equity could her separate estate be made liable for a tort or a breach of trust; thus, where a woman in whom the legal estate in a rent-charge was vested in trust to apply the rent for the benefit of another person, married, and afterwards applied it wrongfully to other purposes, it was ineffectually sought to charge her separate estate with the amount so misapplied (*z*).

It has, however, been enacted by the Married Women's Property Act, 1882 (*a*), that a married woman shall be capable of entering into and rendering herself liable in respect of and to the extent of her separate property on any contract (which includes the acceptance of any trust, and the liability extends to any breach of trust (*b*)), and of suing and being sued either in contract or in tort, or otherwise, in all respects as if she were a *feme sole*, and her husband need not be joined as a party; and any damages or costs recovered against her shall be payable out of her separate property. And further (*c*), that every contract entered into by a married woman shall be deemed to be a contract with respect to and to bind her separate property (*d*), unless the contrary be shown.

A creditor can obtain a judgment against the separate estate, and can then obtain payment out of it; but where he has no such judgment he cannot interfere to prevent the woman from dealing with her property (*e*). The notion at one time prevailing that the engagements of a married woman were in the nature of charges on her separate estate was erroneous (*f*). Formerly her engagements could not be enforced against separate estate to

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nor such as she is restrained from anticipating at that date. But in cases within the M. W. P. Act, 1882 (see s. 1, subs. 4), this decision is as to the former point not applicable; see 35 Solors. Journ. 341.

(*y*) Per Kindersley, V.-C., in *Matthewman's Case*, L. R. 3 Eq. 787.

(*z*) *Wainford* v. *Heyl*, L. R. 20 Eq. 321.

(*a*) 45 & 46 Vict. c. 75, s. 1 (2).

(*b*) S. 24. 35 Solors. Journ. 341, 359.

(*c*) S. 1 (3).

(*d*) This means property as to which she may reasonably be deemed to have contracted, *Leak* v. *Driffield*, 24 Q. B. D. 98; and the contract is not binding at all unless she had some separate property at the date of the contract; *Re Shakespear*, 30 Ch. D. 169; *Palliser* v. *Gurney*, 19 Q. B. D. 519.

(*e*) *Robinson* v. *Pickering*, 16 Ch. D. 660.

(*f*) *Owens* v. *Dickenson*, Cr. & Ph. 48.

which she became entitled subsequently to such engagements (*g*). But it is enacted by the Married Women's Property Act, 1882 (*h*), that every contract entered into by a married woman with respect to and to bind her separate property shall bind not only the separate property which she is possessed of or entitled to at the date of the contract, but also all separate property which she may thereafter acquire; and that every married woman carrying on a trade separately from her husband shall, in respect of her separate property, be subject to the bankruptcy laws in the same way as if she were a *feme sole*.

Clergy.

To complete this branch of the subject—namely, the power of certain persons to alienate—it should be added that beneficed clergymen, who, as we have seen (*i*), Lord Coke says, have a qualified fee simple in their livings, cannot charge even against themselves the fruits of their livings or any part of them (*j*). But the profits of a benefice may be applied to the satisfaction of the debt of a judgment creditor of the clergyman, by means of a writ of *fieri facias de bonis ecclesiasticis*, or a writ of sequestration—modes of execution for debt (*k*). The statutes now regulating this are 12 & 13 Vict. c. 67, 34 & 35 Vict. c. 45.

Descent.

It only remains to be added that, subject to testamentary disposition and to its liabilities to creditors, an estate in fee simple descends, upon the death of its owner, on his real representative or heir; except that, in the case of the death of a man, leaving a widow, there may intervene a right of dower in her, in other words, a right to an estate during her life in a third of his lands; and in the case of the death of a woman leaving a husband, there having been born issue inheritable to the estate, a right in him to an estate during his life, called an estate by the curtesy, in the whole of the lands to which she was entitled for an estate of inheritance.

See now ~~settled~~ Land Transfer Act 1897.

Of these interests, however, we reserve the consideration for the next chapter.

(*g*) *Pike* v. *Fitzgibbon*, 17 Ch. D. 454; *King* v. *Lucas*, 23 Ch. D. 724.

(*h*) 45 & 46 Vict. c. 74, s. 1 (4) & (5). For a discussion of the law as to contracts and torts of a married woman both before and since the Act, the reader is referred to *Scott* v. *Morley*, 20 Q. B. D. 120 (where see the form of judgment); *Beck* v. *Pierce*, 23 Q. B. D. 316.

(*i*) *Ante*, p. 82.

(*j*) *Hawkins* v. *Gathercole*, 6 De G. M. & G. 1; Wms. R. P. 116.

(*k*) See R. S. C., Ord. XLIII., rr. 3–5; and the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 52; Chitty's Archbold's Practice of the Queen's Bench Division, chap. ciii.

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CHAPTER V.

DESCENT OR DEVOLUTION OF FREEHOLDS OF INHERITANCE, AND HEREIN OF DOWER AND CURTESY.

I. Descent to heirs subject to dower and curtesy.

On the death of a tenant in fee simple, should he not have disposed of his estate by will, it descends to his heir, or, if he took by descent, to the heir of the purchaser, *i.e.* the last person entitled who acquired the estate otherwise than by descent (*a*); and on the death of a tenant in tail, the estate descends to the heir *per formam doni* of the donee in tail. If, however, the deceased tenant in fee simple or in tail was a man who left a widow, there might intervene a right in her to "dower" out of the estate; or, if a female leaving a husband, an estate in him, called "a tenancy by the curtesy of England."

a. Dower (*b*). Assignment of.

Dower is a right in the widow of tenant in fee simple or in tail to the enjoyment for her life of a portion of the lands of her husband; and to have this portion specifically set out by metes and bounds and assigned to her—that is, where the husband was solely "seised," for where he was seised in common with others, she cannot be endowed by metes and bounds (*b*). In the latter case her dower shall be assigned to her in common; for the "dowress," as the widow is called, being in *pro tanto* of her husband's estate, cannot have it in other manner than he himself had (*c*). The part which the common law assigns to her is one-third; but in gavelkind lands she takes a moiety. By Magna Charta, it was provided that the widow should remain in her husband's capital mansion-house for forty days after his death,

One-third except in gavelkind.

(*a*) See the definition, post, p. 135 "Purchase is always intended by title, and most properly by some kind of conveyance, either for money or some other consideration, or freely of gift; for that is in law also a purchase;" Co. Litt. 18*b*.

(*b*) See 1 Cruise, Dig. Tit. VI., p. 151; Challis, R. P. 279; and as to the history of the law of Dower, see Digby, R. P., pp. 108 *et seq.*

(*c*) See, as to assignment of dower, 1 Cruise, Dig. 168; and for form of decree in action for dower, see 2 Seton on Decrees, 681.

during which time her dower should be assigned (*e*). These forty days were called the widow's "quarentine" (*f*).

For life except in gavelkind.

"Dower was," says Blackstone (*g*), "formerly forfeitable by incontinency or a second marriage. By the famous charter of Henry I., this condition of widowhood and chastity was only required in case the husband left any issue, and afterwards we hear no more of it."

"Free bench."

In gavelkind lands, however, the right to dower (formerly called "free bench") is still subject to the condition of the widow remaining chaste and unmarried (*h*).

Attaches only on estates in possession.

The right to dower attaches only on an estate of inheritance (*i*), to which issue of the wife by the husband might by possibility inherit (*j*), and of which the husband was seised in possession (or seised subject only to a term of years) (*k*), as distinguished from one to which he was entitled in remainder or reversion expectant on an estate of freehold; but the right attaches if the husband had the right to seisin, although he died without obtaining actual seisin, and, if the widow was married after the 1st January, 1834, whether the husband's estate was equitable or legal (*l*). The husband's estate must have been held in severalty or in common, and not in joint tenancy, for reasons which will appear when we come to deal with those modes of ownership (*m*).

Not on estates held in joint tenancy.

Only to wife at tenant's death and past the age of nine years.

The existence of a right to dower is conditional on the widow having been the wife of the tenant at his death, and past the age of nine years (*n*). A sentence of divorce involving a dissolution of the marriage itself, or as it is technically termed "*a vinculo matrimonii*," though not a mere judicial separation, or as it was called, divorce "*a mensâ et thoro*" (*o*) would extinguish the right. Under the common law even adultery would not destroy the right; though under the Statute of Westminster the Second (*p*), were the wife to elope from her husband—that is, leave his house

(*e*) See the clause set out in Digby, R. P., 110.

(*f*) 2 Bl. 135; 2nd Instit. 16; Digby, R. P., 110.

(*g*) 2 Bl. 133.

(*h*) Prerogativa Regis, 17 Ed. 2, stat. 1, cxvi, Robinson on Gavelkind, 160.

(*i*) Including an estate tail; Litt. ss. 36, 53; Co. Litt. 40*a*; 1 Cruise, Dig. 161.

(*j*) But it is not necessary that any such issue should have been born; Litt. s. 36.

(*k*) 1 Cruise, Dig. 162. For seisin is unaffected by the existence of a term of years; Challis, R. P. 77.

(*l*) 3 & 4 Wm. IV. c. 105, ss. 2, 3. In cases of marriage before or on the 1st January, 1834, the dower did not attach on equitable estates.

(*m*) *Post*, chap. ix.

(*n*) Co. Litt. 33*a*.

(*o*) Co. Litt. 33*b*.

(*p*) 13 Ed. I. c. 34; Co. Litt. 32*a*.

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and live with the adulterer—she would lose her dower, unless the husband were subsequently reconciled to her (*q*). It has recently been held that where a decree for dissolution of the marriage has been made under the Divorce Act (20 & 21 Vict. c. 85), though obtained on the petition of the wife against the husband on the ground of his misconduct, the right to dower ceases (*r*).

Possibility of issue inheritable (*s*).

It is also a condition that the lands, the subject of the claim to dower, should be such that there was a possibility to inherit them on the part of any issue which the wife might have had, whether any such issue were in fact born or not. In the case of curtesy, we shall see there must have been such issue born. Therefore, says Blackstone (*t*):—

"If a man seised in fee simple hath a son by his first wife, and after marries a second wife she shall be endowed of his lands; for her issue might by possibility have been heir, on the death of the son by the former wife. But if there be a donee in special tail, who holds lands to him and the heirs of his body begotten on Jane his wife; though Jane may be endowed of these lands, yet, if Jane dies, and he marries a second wife, that second wife shall never be endowed of the lands entailed: for no issue, that she could have, could by any possibility inherit them."

And says Lord Coke (*u*):—

"Albeit the wife be a hundred years old, or that the husband at his death was but four or seven years old, so as she had no possibility to have issue by him, yet seeing the law saith, that if the wife be above the age of nine years at the death of her husband she shall be endowed, and that women in ancient times have had children at that age, whereunto no woman doth now attain, the law cannot judge that impossible, which by nature was possible. And in my time, a woman above three score years old hath had a child."

Right of dower, how defeated under the Dower Act.

The right of a woman married after the 1st January, 1834, to dower may be defeated, wholly or in part, by a declaration against dower contained in the deed of conveyance to the husband, or in any other deed executed by him, or in his will, or by disposition in his lifetime or by will. Thus it will be defeated by a declaration in the original deed of conveyance, or in any deed executed by the husband, that the widow shall not be entitled to dower out of such land (*v*); or by a declaration in his

(*q*) *Woodward* v. *Dowse*, 10 C. B. (N S.), 722, and *Bostock* v. *Smith*, 34 Beav. 57; 1 Cruise, Dig. 175.

(*r*) *Frampton* v. *Stephens*, 21 Ch. D. 164.

(*s*) Co. Litt. 40*a*.

(*t*) 2 Bl. 131.

(*u*) Co. Litt. 40*a*.

(*v*) 3 & 4 Wm. IV., c. 105, s. 6.

will as to any land of which he dies wholly or partially intestate, that she shall not be entitled to dower out of such land, or out of any of his land (*x*); or by any absolute disposition in his lifetime, or by his will, as to any land so disposed of (*y*); and, unless a contrary intention be declared in the will, if the husband devise any land, or any estate or interest therein, by his will to or for the benefit of his widow, out of which land she would otherwise be entitled to dower, she shall not be entitled to dower out of any land of her husband (*z*); and all partial estates and interests and charges created by any disposition or will of a husband, and all his debts, incumbrances, contracts and engagements, prevail against the widow's right to dower (*a*). Such is the law in respect of all cases falling within the Dower Act of 1833. That Act applies to all widows whose marriage dates subsequently to the 1st January, 1834 (*b*).

Effect of Dower Act.

"The effect of the Act," says Mr. J. Williams (*c*), "is evidently to deprive the wife of her dower, except as against her husband's heir-at-law. If the husband should die intestate, and possessed of any lands, the wife's dower out of such lands is still left to her for her support, unless indeed the husband should have executed a declaration to the contrary."

And he deprecates what after the Act became a common practice, namely, putting a declaration against dower as a common form in purchase deeds.

How otherwise defeated. Jointure.

The wife's right to dower may be also barred by a jointure settled upon the wife before marriage in substitution for her dower; if settled after marriage, she has her election after her husband's death between jointure and dower. A jointure is defined by Sir Edward Coke (*d*) to be "a competent livelihood of freehold for the wife of lands or tenements, &c., to take effect presently in possession or profit after the decease of her husband, for the life of the wife at the least"—that is, it must not be *pur autre vie*, or for a term of years or other smaller estate; hence it is a freehold. It was called a jointure, because, before the Statute of Uses (*e*), it was usual on marriage to settle by deed some

(*x*) *Ib.* s. 7.

(*y*) *Ib.* s. 4.

(*z*) *Ib.* s. 9. See *Re Thomas, Thomas* v. *Howell*, 34 Ch. D. 166, where a gift of the income of part of the proceeds of sale of the husband's land was held to deprive the widow of dower.

(*a*) *Ib.* s. 5.

(*b*) *Ib.* s. 14, excepting from the Act women married "*on* or before" 1st Jan., 1834.

(*c*) R. P. 277.

(*d*) Co. Litt. 36*b*. See, as to Jointure, 1 Cruise, Dig. Tit. vii. p. 187, and notes in Shelf. R. P. Stat.

(*e*) 27 Hen. VIII. c. 10.

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special estate to the use of the husband and wife for their lives in joint tenancy, or "jointure"; which settlement would be a provision for the wife in case she survived her husband (*f*). Before that statute the husband had no legal seisin but only an equitable estate in such lands as were vested in another to his "use," and therefore the widow was not dowable out of them, for before the Dower Act dower did not attach except upon lands of which he was seised at law; but, as will presently appear, by reason of the Statute of Uses he acquired such seisin, and therefore the widow would have been entitled to dower out of them, and at the same time to any lands that might be settled by way of jointure, had not the Statute of Uses provided also that, upon the husband making such estate in jointure to the wife before marriage, she should be precluded from dower (*g*). In addition to this legal bar of dower, there may be an equitable bar, the ground of which is contract; as when the wife has, being of full age, before marriage, agreed to take something else in lieu of dower, as, for example, a provision out of the personal estate; then she will be restrained in equity from setting up a claim to dower. The Court disregards the nature of the property and the *quantum;* and the only question in such cases is whether the provision alleged to have been given in satisfaction of dower was so given or not; whether that was part of the contract (*h*).

Equitable bar by contract.

Old law.

The Dower Act effected a considerable modification of the old law on the whole subject of dower, which still applies to all marriages previous to 2nd January, 1834.

Under the old law the dower attached only where there was a legal seisin on the part of the husband, as distinguished from a mere equitable interest in him. This is an exception to the general rule, that in the incidents of estates equity follows the law (*i*). Thus, suppose a legal estate to be vested in A., and that he has obtained legal seisin of the lands, but the estate is to be held by him in trust for B., previously to the Dower Act of

(*f*) See Digby, R. P., 287, 308 n.

(*g*) 27 Hen. VIII. c. 10, s. 4: see this clause in 1 Cruise, Dig. 188, and in Digby, R. P. 307, 308; 2 Bl. 137; and see 3 Da. i. 310. For the modern form of limitation of a jointure, see Dav. Conc. Prec. 468; "To the use that if the said B. (wife) shall survive the said A. (husband), she and her assigns may thenceforth receive during her life the yearly rent-charge of £ by way of jointure and in bar of dower, to be charged upon all the said premises." And see the form in 2 K. & E. 583.

(*h*) *Dyke* v. *Rendall*, 2 De G. M. & G. 218, *per* Lord St. Leonards.

(*i*) *Per* Jessel, M.R., *Cooper* v. *Macdonald*, 7 Ch. D. 295.

1833, the widow of B. would not have been dowable. But a seisin in law (*k*) was sufficient. As where lands descended to the husband, before entry he had but a seisin in law (not in deed); and yet it was said "the wife shall be endowed, albeit it be not reduced to an actual possession, for it lieth not in the power of the wife to bring it to an actual seisin, as the husband may do of his wife's land when he is to be tenant by curtesy" (*l*).

Difficulty in way of defeating right.

Again, under the old law, the right of the wife to dower attached on the estate contemporaneously with the acquisition of seisin or of the right to seisin by the husband; and could not be defeated by him except with the wife's concurrence, which, prior to the Act for the Abolition of Fines and Recoveries (*m*), could only be obtained through the costly process of a fine. This right prevailed against any alienation by the husband whether by conveyance on sale or otherwise in his lifetime, or by his testamentary disposition; and was paramount to the claims of his creditors. The difficulty to which this led, particularly in the case of a sale of the lands by the husband in his lifetime, called forth the ingenuity of conveyancers in framing forms of conveyance adapted, on the occasion of the purchase by the husband, to exclude the right of dower. Several methods were devised (*n*), which were ultimately in practice superseded by that known as the conveyance "to uses to bar dower," which will be presently explained (*o*).

Power to lease.

It remains to be added, that under the Settled Estates Act, 1877 (*p*), the tenant in dower entitled to the possession or receipt of rents and profits may lease the lands, except the principal mansion-house and the demesnes thereof and other lands usually occupied therewith, for any term not exceeding twenty-one years. A tenant in dower is not included among the persons upon whom the Settled Land Act, 1882 (*q*), confers the powers of a tenant for life under that Act.

(*k*) "*Seisin in law*" is where a person has only a right to the immediate possession as distinguished from "*seisin in deed*," which is where he is in actual possession: see Challis, R. P. 180, 181; 1 Cruise, Dig. 49, 50; Butler's note (1) to Co. Litt. 266*b*.

(*l*) Co. Litt. 31*a*.

(*m*) 3 & 4 Wm. IV. c. 74. See *ante*, p. 68.

(*n*) See Wms. R. P. 274, and *post*, p. 291.

(*o*) *Post*, ch. xi., p. 291.

(*p*) 40 & 41 Vict. c. 18, s. 46 (which re-enacts with slight alterations 19 & 20 Vict. c. 120, s. 32). See, as to leases under this section, *Davies* v. *Davies*, 38 Ch. D. 499.

(*q*) 45 & 46 Vict. c. 38; see s. 58.

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b. Curtesy (*r*).

In the whole of the lands—except in gavelkind.

For life—except in gavelkind.

In wife's separate estate.

Tenancy by the curtesy of England, commonly called "tenancy by the curtesy," is an estate of a husband in the lands of his wife, very much like the estate in dower of the wife in the lands of her husband; except that, instead of being confined to a third of the lands, it is an estate in the whole, for the husband's life. If the lands, however, be gavelkind, he takes but a moiety; and that so long only as he does not marry again (*s*). After some conflicting decisions, it is now settled that, where lands belong to a wife for her separate use, the husband will take an estate by the curtesy in them, if she dies without having disposed of them by will or otherwise, equity in this case following the law (*t*). It appears probable that the Married Women's Property Act, 1882 (*u*), does not affect the husband's right to curtesy, except so far as the land is conveyed away or devised by the wife; but as yet there has been no decision as to this (*x*).

Valid and subsisting marriage at wife's death.

The marriage must be valid and subsisting at the time of the wife's death; so that, if it be *ipso facto* void, or be avoided by divorce *a vinculo matrimonii*, the right to an estate by the curtesy is defeated (*y*).

Actual birth of issue inheritable in mother's life.

Except in gavelkind.

As to the birth of issue inheritable to the lands, whereas in the case of dower, it is sufficient that the lands be such as issue, had there been any, might have inherited; in the case of curtesy, the actual birth of issue is required. Such, at least, is the case throughout the greater part of England; but in gavelkind lands the tenancy by the curtesy arises whether issue were actually born or not (*z*). A notion has prevailed that the child must be heard to cry, but that is a mistake; crying, though a very unmistakable sign, is not the only evidence of life. The child, however, must be born during the life of the mother. Should she die in labour, and were the child extracted after death from the womb, by what is called the Cæsarean operation, it would not suffice. It may have been born at any time during the coverture, without reference to the actual period of seisin. The issue, moreover, must have been capable of inheriting the mother's estate. In the case, therefore, of an estate tail limited to her and

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(*r*) As to Curtesy, see Challis, R. P. 276; Digby, R. P. 142.

(*s*) Co. Litt. 30*a* (note by Hargrave).

(*t*) *Cooper* v. *Macdonald*, 7 Ch. D. 288.

(*u*) 45 & 46 Vict. c. 75.

(*x*) 45 & 46 Vict. c. 75, s. 1; see Wolstenholme & Turner, Conv. Acts, &c., p. 184; Hood & Challis's Conv. Act, 326.

(*y*) 1 Cruise, Dig. 140.

(*z*) Co. Litt. 30*a*, 111*a*.

the heirs male of her body, the birth of a daughter would give the husband no right (*a*).

Wife need not have been legally seised.

Curtesy differs from dower (as the law stood before 1834), in that it is not necessary that the seisin of the wife, or rather of the husband in her right, should be legal. An equitable seisin (for instance, if the lands were vested in trustees for her and her heirs) would suffice (*b*). As in the case of dower, to give the husband his tenancy by the curtesy, the estate must have been not reversionary but in possession: and, where the lands devolve on the wife by descent, an actual seisin must have been obtained, as distinguished from a mere right to obtain it; or, to use other words, it is necessary that the seisin of corporeal hereditaments should be seisin in deed, not seisin in law only (*c*).

Estate must have been in possession.

Power to lease.

The tenant by curtesy has the same power of leasing as the tenant by dower under the Settled Estates Act, 1877 (*d*).

Powers under Settled Land Act, 1882.

The powers of a tenant for life under the Act are given to a tenant by the curtesy by the Settled Land Act, 1882 (*e*); and for purposes of that Act his estate is to be deemed to arise under a settlement made by his wife (*f*), though in fact the property may have come to her by inheritance.

No interference with power of alienation.

A tenancy by the curtesy is not frequently met with now, as the rights of husbands in the estates of their wives are generally defined by a marriage settlement. It never, like dower, added to the difficulty of alienating the lands; for the husband and wife together could always make such dispositions of the wife's lands as she could do if unmarried—formerly, by fine levied in the Court of Common Pleas, afterwards by a deed of conveyance duly acknowledged (*g*)—separate examination being requisite under the old method as well as under the modern one. By any such disposition the inchoate right of the husband to curtesy would be lost.

Origin.

As in the case of dower, so in that of curtesy, the origin of its introduction into English jurisprudence is obscure (*h*).

(*a*) 2 Bl. 128; Co. Litt. 29*b*; *Paine's Case*, 8 Rep. at 34*b*.

(*b*) See *per* M.R. in *Cooper* v. *Macdonald*, 7 Ch. D. 295.

(*c*) Co. Litt. 29*a*.

(*d*) 40 & 41 Vict. c. 18, s. 46.

(*e*) 45 & 46 Vict. c. 38, s. 58 (1), (viii.). See *ante*, p. 49 *et seq.*

(*f*) 47 & 48 Vict. c. 18, s. 8.

(*g*) 3 & 4 Wm. IV. c. 74, ss. 77, 79, 80; 19 & 20 Vict. c. 108, s. 73; and 45 & 46 Vict. c. 39, s. 7. *Ante*, p. 114.

(*h*) See 2 Bl. 126 and 1 Cruise, Dig. 139. Spelman (Gloss. *s.v. Jus Curialitatis*) and Blount (Law Dict. *s.v. Curtesy of England*) say that curtesy existed in the law of Normandy before the Conquest. As to the origin of the term, see Digby, R. P. 142.

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II. Inheritance.

Subject to any rights in respect of dower or curtesy, an estate in fee simple devolves on the heir; and here, to adopt the words of Blackstone (*i*) :—

Heir—what.

"It must first be observed, that by law no inheritance can vest, nor can any person be the actual complete heir of another, till the ancestor is previously dead, *Nemo est haeres viventis.* Before that time the person who is next in the line of succession is called an heir apparent, or heir presumptive. Heirs apparent are such, whose right of inheritance is indefeasible, provided they outlive the ancestor; as the eldest son or his issue, who must by the course of the common law be heirs to the father whenever he happens to die. Heirs presumptive are such, who, if the ancestor should die immediately, would in the present circumstances of things be his heirs; but whose right of inheritance may be defeated by the contingency of some nearer heir being born: as a brother, or nephew, whose presumptive succession may be destroyed by the birth of a child; or a daughter, whose present hopes may be hereafter cut off by the birth of a son. Nay, even if the estate hath descended, by the death of the owner, to such brother, or nephew, or daughter; in the former cases the estate shall be devested and taken away by the birth of a posthumous child; and, in the latter, it shall also be totally devested by the birth of a posthumous son."

Posthumous children.

Posthumous children are enabled to take estates as purchasers under a marriage or other settlement as if born in their parent's lifetime, by 10 & 11 Wm. III. c. 16: the House of Lords had previously decided that such child would take in the case of an estate devised by will (*k*). If a posthumous child takes by descent, he takes only from his birth; but if he takes under the statute, he takes from his parent's death.

The rules of descent had been the same for above 400 years, when Lord Hale reduced them to a series of canons, which were afterwards explained and illustrated by Blackstone in his Commentaries. The same rules, modified by the Inheritance Act (*l*) as to persons dying on or after the 1st January, 1834, still prescribe the course of descent. It should be added that, even where the common law is excluded by the peculiarities of the customs of either gavelkind or borough-English, the course of succession, except so far as such peculiarities affect it, follows the common law; for example, the descent goes to males before females, to lineal before collateral heirs.

Rules or canons of descent.

The law of descent as now prevailing, may be reduced to the following canons or rules:—

(*i*) 2 Bl. 208.

(*k*) *Reeve* v. *Long*, 1 Salk. 228; and see 2 Wms. Saund. 387*a*.

(*l*) 3 & 4 Wm. IV. c. 106. Amended by 22 & 23 Vict. c. 35, ss. 19 and 20. Challis, R. P. 184.

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"Purchaser" defined.

I. In every case descent is traced from the "purchaser" (m), *i.e.*, "the person who last acquired the land otherwise than by descent, or than by any escheat, partition, or inclosure, by the effect of which the land has become part of, or descendible in the same manner as, other land acquired by descent" (n).

According to the old law, descent was to be traced from the person who last had the seisin in deed, *i.e.* actual seisin as distinguished from seisin in law. This law was briefly expressed in the maxim *Seisina facit stipitem* (o). But, in all cases of immediate descent from the first purchaser, the descent was traced from him whether he had an estate in possession, reversion, or remainder, and whether he had actual seisin or not (p).

It being often uncertain whether a person had acquired by descent or otherwise, it is provided (q) "to the intent that the pedigree may never be carried further back than the circumstances of the case and the nature of the title shall require," that "the person last entitled to the land," who is defined (r) as including "the last person who had a right thereto, whether he did or did not obtain the possession or the receipt of the rents and profits thereof," shall be considered to have been the purchaser, unless it be proved that he inherited the same; and "in like manner the last person from whom the land shall be proved to have been inherited shall in every case be considered to have been the purchaser, unless it shall be proved that he inherited the same" (s).

Devise to heir.

By the common law, where a man devised land to his heir so that he would take the same estate as would have come to him by descent, he took by the descent, not by the devise; but by the Inheritance Act it is enacted that the heir shall be considered to have acquired the land as devisee (t), *i.e.*, as a purchaser.

Cases of settlement.

Similarly, where, by any assurance other than a will land was limited to the person or to the heirs of the person who thereby conveyed the same land, such person acquired no new estate, but was entitled as of his former estate (u). By the Inheritance Act, it is provided that in the case of any such assurance executed after 31st December, 1833, the

(m) 3 & 4 Wm. IV. c. 106, s. 2.
(n) *Ib.* s. 1, thus defines "Purchaser."
(o) 2 Bl. 209; Co. Litt. 11*b*.
(p) See 2 Preston on Abstracts, 440.
(q) 3 & 4 Wm. IV. c. 106, s. 2.
(r) *Ib.* s. 1.
(s) *Ib.* s. 2: see *In re Douglas*, 28 Ch. D. 327.
(t) 3 & 4 Wm. IV. c. 106, s. 3.
(u) 2 Bl. 242.

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person to whom or to whose heirs the land is limited shall be considered to have acquired the same as purchaser (*x*); and further, where any person acquires any land by purchase under a limitation to the heirs of his ancestor, whether by assurance executed after 31st December, 1833, or by the will of a testator dying after that day, such land shall descend as if the ancestor had been the purchaser (*y*). A common instance of this is a settlement in which there is an ultimate limitation to the heirs of the settlor (*z*). In such a case the settlor (*e.g.*) although he may originally have acquired the lands by descent, will be accounted the purchaser, not he from whom the lands descended, nor the settlor's heir.

Failure of heirs.

By 22 & 23 Vict. c. 35 (*a*), s. 19, it is provided that where there shall be a total failure of heirs of the purchaser, or where any land shall be descendible as if an ancestor had been the purchaser, and there shall be a total failure of the heirs of such ancestor, the land shall descend as if the person last entitled had been the purchaser.

The expression "land" in the Inheritance Act is thereby defined as including every interest capable of being inherited, whether in possession, reversion, remainder, or contingency (*b*).

Let us suppose John Smith to die intestate, seised of lands in fee simple; subject to the payment of his debts, if there is not sufficient to pay them out of his personal estate, and subject to his widow's right to dower, they will descend. If he were the purchaser, that is, if he had acquired them otherwise than by descent (for instance, if they had been conveyed or devised to him, and in the latter case, even though he were the heir of the testator (*c*)), they will go to his own heir. Or, suppose he had originally acquired the lands by descent, but by a marriage settlement (executed since the 31st December, 1833), he had limited the lands to himself for life, and after his death to the first and other

(*x*) 3 & 4 Wm. IV. c. 106, s. 3.

(*y*) *Ib.* s. 4.

(*z*) See (*e.g.*) Dav. Conc. Prec. No. cxxvi. p. 476.

(*a*) Commonly known as "Lord St. Leonards' Act," 1859.

(*b*) 3 & 4 Wm. IV. c. 106, s. 1. The section specifies all hereditaments corporeal or incorporeal, freehold or copyhold, or of any other tenure, and whether descendible according to the common law, or according to the custom of gavelkind or borough-English, or any other custom, and money to be laid out in the purchase of land, and chattels and other property transmissible to heirs, and any possibility, right or title of entry, or action.

(*c*) *Ib.* s. 3.

sons of the marriage in tail male, and in default of such issue to himself in fee, or "to his own right heirs"; in such case, in the event of his death intestate, after failure of any issue in tail male, the descent will now be traced from him as purchaser (*d*).

On the other hand, suppose John Smith to have acquired the lands as heir to his father, Thomas Smith, under a limitation (contained in a deed executed, or the will of a testator dying after 1833) to his father, Thomas Smith, in fee simple; on the death of John Smith intestate, the descent will be traced, not from John Smith, but from Thomas Smith (*e*); unless there is a total failure of heirs of Thomas Smith, in which case only, the descent will be traced from John (*f*). Similarly, if John had inherited the lands from his grandfather, who had acquired them by purchase, and there is a total failure of heirs of the grandfather, the descent will be traced from John Smith (*g*).

II. The second rule is that the land shall, in the first place, descend lineally to the issue of the purchaser *in infinitum*.

II. To issue.

III. The third rule is that the male issue shall be admitted before the female; and where two or more of the male issue are in equal degree of consanguinity to the purchaser, the eldest only shall inherit, but the females in equal degree shall inherit altogether. In such case the females are called co-parceners, and should they effect a partition of the lands descended to them, they will not thereby become purchasers, but the several parcels of land will descend in the same manner as the individual shares before partition (*h*).

III. Males before females. Eldest male—females equally.

IV. The fourth rule is that the lineal descendants *in infinitum* of any person deceased "represent," or take the place of, their ancestor, that is, they stand in the place in the line of descent in which the deceased person would have stood if he had been living (*i*).

IV. Representation by lineal descendants.

This is called taking *per stirpes*, by the roots or stocks, as distinguished from *per capita*, by the heads or individuals. To take an example: A. has three daughters, C., D., and E., and no sons: C. dies, leaving two sons; D. dies, leaving two daughters;

Per stirpes.

(*d*) *Ib.* s. 3.
(*e*) *Ib.* s. 4.
(*f*) 22 & 23 Vict. c. 35, s. 19.
(*g*) *Ib.*
(*h*) See 3 & 4 Wm. IV. c. 106, s. 1, by which "Land" is to include any share of the hereditaments and properties therein mentioned; and *Doe* d. *Crosthwaite* v. *Dixon*, 5 Ad. & El. 834. As to coparceny, see *Post*, ch. ix, p. 252.
(*i*) Wms. R. P. 124: Challis, R. P. 189.

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E. dies, leaving a daughter, and son younger than the daughter. When A. dies, C.'s eldest son will be entitled to one-third, D.'s two daughters to another one-third as co-parceners, and E's son to the remaining one-third of A.'s lands.

The preceding rules apply as well to the descent of an estate tail as of an estate in fee simple. But, when the issue are exhausted, the estate tail must determine. Not so in the case of an estate in fee-simple, to which the following rules also apply.

V. On failure of descendants, to nearest lineal ancestor.

V. The fifth rule is that, on failure of the issue, *i.e.*, lineal descendants, of the purchaser, the inheritance shall go to his lineal ancestor.

Formerly, on failure of lineal descendants of the person last seised, the inheritance descended to his collateral relations, being of the blood of the first purchaser—subject to the three last preceding rules; for it was held that an inheritance could not ascend, and that therefore no ancestor could inherit. Now, by the Inheritance Act (*k*), it is enacted that—

> S. 6. "Every lineal ancestor shall be capable of being heir to any of his issue; and in every case where there shall be no issue of the purchaser, his nearest lineal ancestor shall be his heir in preference to any person who would have been entitled to inherit, either by tracing his descent through such lineal ancestor, or in consequence of there being no descendant of such lineal ancestor, so that the father shall be preferred to a brother or sister, and a more remote lineal ancestor to any of his issue other than a nearer lineal ancestor or his issue."

Thus, suppose John Smith, having acquired his land by purchase, to have died intestate, without issue, leaving a father and brothers and sisters surviving, the father will inherit in preference to the brothers and sisters. Or, again, suppose John Smith, having acquired his land by purchase, to have died intestate without issue, himself having been the only child of his father, who had predeceased him, but leaving a grandfather and first cousins him surviving, the grandfather will inherit in preference to the cousins.

VI. Preference to paternal line.

VI. The sixth rule is that, among the lineal ancestors of the purchaser, the paternal line (whether of the purchaser, or of any ancestor, male or female), is always preferred to the maternal.

(*k*) 3 & 4 Wm. IV. c. 106, s. 6.

In collateral inheritances the male stocks are preferred to the female. So it is provided in continuation of the last rule (*l*), that (1) none of the maternal ancestors of the person from whom the descent is to be traced, nor any of their descendants, shall be capable of inheriting until all his paternal ancestors and their descendants shall have failed; also, (2) that no female paternal ancestor of such person, nor any of her descendants, shall be capable of inheriting until all his male paternal ancestors and their descendants shall have failed; and (3) that no female maternal ancestor of such person, nor any of her descendants, shall be capable of inheriting until all his male maternal ancestors and their descendants shall have failed (*m*). In like manner, where there is a failure of male paternal ancestors and their descendants, the mother of his more remote male paternal ancestor or her descendants shall be preferred to the mother of a less remote or her descendants; and where there is a failure of male maternal ancestors and their descendants, the mother of his more remote male maternal ancestor and her descendants shall be preferred to the mother of a less remote male maternal ancestor and her descendants (*n*). After the female paternal ancestors and their heirs, then, comes the mother of the purchaser.

A learned controversy had arisen whether, where, upon failure of the male paternal line, it became necessary for the first time to resort to a female stock, the descent should be traced through the mother of the nearer or more remote ancestor in that line (*o*) This doubt was settled by the above provisions of the Inheritance Act (*p*).

According to the sixth rule, then, had John Smith died without issue, but (1) leaving his grandfather on his father's side, and his grandfather's mother and his own mother, him surviving; his mother could in no case inherit so long as there lived his grandfather, or any of his grandfather's descendants, or his grandfather's mother or any of her descendants. Or (2), suppose him to have left his grandmother on his father's side, and his great grandfather on his father's side; his grandmother and her descendants could not inherit until after the failure of his great grandfather and his descendants. Or (3), suppose that he left

(*l*) 3 & 4 Wm. IV. c. 106, s. 6.
(*m*) *Ib.* s. 7.
(*n*) S. 8.
(*o*) 2 Bl. 237.
(*p*) 3 & 4 Wm. IV. c. 106, s. 8.

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no paternal ancestors or mother, but his mother's mother and mother's father's father him surviving; his mother's mother or her descendants could in no case inherit so long as there lived his mother's grandfather or any of his descendants (*q*). Again, suppose John Smith to have left the mother of his father, and the mother of his father's father him surviving; the mother of his father's father and her descendants would inherit before the mother of his father and her descendants. In like manner, suppose John Smith to have died, all his relations on his father's side having predeceased him, likewise his mother, but his mother's mother and his mother's father's mother to have survived him, the mother's father's mother and her descendants would be preferred to his mother's mother and her descendants.

VII. Half blood.

VII. The seventh rule is, that the issue of an ancestor related by the whole blood to the purchaser, are preferred to those related by the half blood. By the old law the half blood could not inherit, but now it is provided by the Inheritance Act (*r*), that any person related to the person from whom the descent is to be traced by the half blood shall be capable of being his heir; but a relation by the half blood is to stand in the order of inheritance next after any relation in the same degree of the whole blood and his issue, where the common ancestor is a male, and next after the common ancestor where such ancestor is a female: so that the brother of the half blood on the part of the father shall inherit next after the sisters of the whole blood on the part of the father and their issue, and the brother of the half blood on the part of the mother next after the mother.

Thus, suppose A. to have had one son B. by his wife X., and two sons C. and D., and two daughters E. and F. by another wife Y.: C., having purchased land dies without issue, his father A. being also dead. D., his younger brother, takes, or, on failure of him and his issue, the sisters E. and F. succeed in preference to B., the eldest brother; but B. (though only of half blood) and his issue will succeed in preference to any collateral relation not descended from their father A., though of the whole blood with C. Again, suppose A. B. to be the purchaser and to die without issue, but leaving two brothers and two sisters, and a half-brother by his mother Z., who has married again since his father's death:

(*q*) 3 & 4 Wm. IV. c. 106, s. 7. (*r*) S. 9.

so long as any of the paternal line of A. B. remain, his half-brother cannot inherit, for his mother could not; but, failing the paternal line, next to his mother in the order of succession will come the half brother, and in preference to any other collateral relation of A. B. *ex parte maternâ*, though of the whole blood of A. B.

Succession duty.

It remains to be added that where any person has or shall become entitled to property by the death of another on or after the 19th May, 1853, the property was made subject to duty by the Succession Duty Act (*s*); and the duty imposed by the Act was made a first charge on the property. The general effect of the Act is that the acquisition of an interest in property in the cases and under the circumstances specified in the Act is to constitute a succession, and every succession is made liable to duty (*t*). A receipt and certificate purporting to be in discharge of the whole duty payable exonerates a *bonâ fide* purchaser (*u*). Additional duties are imposed by the Customs and Inland Revenue Act, 1888 (*x*), and the Customs and Inland Revenue Act, 1889 (*y*), the latter of which duties is sometimes, in conformity with the marginal note to the Act, called "Estate Duty."

(*s*) 16 & 17 Vict. c. 51: see s. 54 as to the date.

(*t*) *Wilcox* v. *Smith*, 4 Dr. 40; and see Dart's V. & P. 314 *et seq.*, and 667.

(*u*) 16 & 17 Vict. c. 51, s. 52.

(*x*) 51 & 52 Vict. c. 8, s. 21.

(*y*) 52 Vict. c. 7, s. 6.

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CHAPTER VI.

ESTATES LESS THAN FREEHOLD—ESTATES AT WILL—ESTATES FOR YEARS—ESTATES BY SUFFERANCE.

ESTATES in Real Property may be divided into (1) freehold estates, and (2) estates less than freehold. Having discussed the nature and incidents of the former, we now proceed to the consideration of the latter.

I. Classification and general characteristics.

Of estates less than freehold, the most important are:—I. Estates at will; II. Estates for years (including tenancies from year to year); and, III. Estates by sufferance.

The use of the expression "goods and chattels," as descriptive of personal property generally, has been already referred to; and the estates under discussion, notwithstanding the immovability of the subject-matter, are ranged under the classification of personalty; but, by reason of their connection with land, they are said to "savour of the realty." They are therefore often spoken of as chattel interests in land; and leaseholds or terms of years are called "chattels real" (*a*).

At common law a chattel real estate could be created or transferred by parol. The Statute of Frauds (*b*) provided that leases for years created by parol "and not put in writing and signed by the parties making or creating the same or their agents thereunto lawfully authorized by writing shall have the force and effect of leases or estates at will only," except (*c*) leases not exceeding the term of three years from the making thereof, whereupon the rent reserved during the term amounts to two third parts of the full annual value. It was by the same Act further provided (*d*) that no leases should be assigned or surrendered unless by deed or note, in writing, signed by the party assigning or surrendering the same "or their agents thereunto lawfully authorized by writing" (*e*).

(*a*) Other instances of chattel interests in land are tenancies by statute merchant, statute staple, and *elegit* (Co. Litt. 42*a*, *ib.* 118*b*), of which the two first named are obsolete (as to tenancy by *elegit*, see *post*, ch. xiv.)

(*b*) 29 Car. II. c. 3, s. 1.

(*c*) *Ib.* s. 2.

(*d*) *Ib.* s. 3.

(*e*) See *Botting* v. *Martin*, 1 Camp. 318.

By the Act to amend the Law of Real Property (*f*), "any lease required by law to be in writing of any tenements or hereditaments, and an assignment of a chattel interest, not being copyhold, in any tenements or hereditaments" are to be void at law unless made by deed.

The leases which are excepted from the Statute of Frauds, as above mentioned, are not required by law to be in writing, and are not therefore within this provision; but all assignments of leases, even of those so excepted, must be by deed.

Devolution.

Land Transfer Act 1897

All chattels real in their incidents partake of the nature of personalty. On the death of the owner, they devolve not upon the heir, the ordinary representative as regards land, but upon the executor or administrator, both of whom are comprehended in the phrase "personal representative." Indeed, they will do this even if they are expressly limited to the heirs; inasmuch as heirs cannot succeed to an interest of the character of personalty (*g*). And were an attempt made to create an estate tail in property of this description, the property would vest absolutely in the first taker (*h*). Thus, suppose a grant of a term of years, or other chattel interest, to A. "and his heirs"; the property would on the death of A. devolve on his executors (*i*). So, under a limitation for a term of years to A. "and the heirs of his body," A. would take absolutely, and the property would go, not to A.'s issue, but to his personal representative. As we have before observed (*k*), personal property is regarded as essentially the subject of absolute ownership; and, strictly speaking, the legal ownership of it is not capable of being dealt with so as to create a succession of interests analogous to successive estates in real property. It has, however, been pointed out that a similar result may be obtained through the medium of a declaration of trust of the beneficial or equitable ownership for persons in succession; and it may be here noticed that if a term of years be bequeathed to A. for his life, and on his death to B., although the whole term is considered to vest in A. during his life, on his death it will shift to and vest in B. (*l*).

(*f*) 8 & 9 Vict. c. 106, s. 3. See the observations on this section in Dav. Conc. Prec., pp. 8 *et seq.*

(*g*) Elph. N. & C. Interp. 257.

(*h*) *Ante*, p 75; Elph. N. & C. Interp. 260.

(*i*) Litt. s. 740.

(*k*) See *ante*, p. 29.

(*l*) Wms. Pers. P. 340; 1 Cruise, Dig. 235; and see as to such "Executory Devises of Terms for Years," 6 Cruise, Dig. 392 *et seq.*; and *post*, p. 275.

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General devise of lands.

From the time of Charles I., it has been held that where in a will there is a general devise of lands and no freeholds to satisfy it, leaseholds will pass; but it was formerly held that leaseholds would not pass by a general devise if there were any freeholds (*m*). Now, however, by the Wills Act (*n*) a general devise of the land of the testator, whether there be freeholds or not, will include leaseholds, unless a contrary intention appear by the will.

Possession.

In reference to a legal freehold interest (*o*), the technical expression by which the possession of the owner is described is "seisin;" but in reference to a chattel real interest, it is "possession." So it is said, as respects the former, that the party is "seised" of the land; as respects the latter, that he is "possessed" of the term (*p*). This originated in the principle of the feudal system, which ascribed seisin alone to that which was the subject-matter of a fief (*q*).

Term of years may commence *in futuro*.

It is a doctrine of the common law that an estate of freehold cannot be limited to commence at a future time (*r*), except by way of remainder limited to take effect upon the determination of a previous estate of freehold. The principle was, that the seisin should never be in abeyance, since the exigencies of a feudal holding required the presence of a tenant to discharge the feudal obligations (*s*). Such is the doctrine as to conveyances operating at common law; but the introduction of uses, as will hereafter appear, introduced some modification in regard to conveyances operating by virtue of the Statute of Uses. In the case

(*m*) *Rose* v. *Bartlett*, Cro. Car. 293. See Theobald on Wills, 158.

(*n*) 1 Vict. c. 26, s. 26. See on this section *Butler* v. *Butler*, 28 Ch. D. 66; and see *post*, ch. xv.

(*o*) *Leach* v. *Jay*, 9 Ch. D. 42.

(*p*) See Co. Litt. 200*b*, 201*a*.

(*q*) The statement in the text as to the reason of the application of the word "seisin" to legal freehold interests appears to have been originally made by Lord Mansfield in *Taylor* d. *Atkyns* v. *Horde* (1 Burr. 107; and in 2 Sm. L. C.); but, as shown by Professor Maitland in a most interesting article on "Seisin of Chattels," Law Quarterly Review, Vol. i., p. 324, it is probably incorrect. Up to the middle of the fifteenth century "seisin" was applied to chattels equally with freeholds, and the word "possessed" was but rarely used. Gradually the two words acquired their modern meanings. See also another article by Professor Maitland, "The Mystery of Seisin," 2 Law Quarterly Review, 481; and the remarks of Fry, L.J., in *Cochrane* v. *Moore*, 25 Q. B. D. 57, at pp. 65, 66.

(*r*) Challis, R. P. 80; 1 Cruise, Dig. 53 (Tit. I. ss. 32, 33).

(*s*) "The freehold never could be in abeyance, because the lord must never be at a loss to know upon whom to call as his tenant; nor a stranger at a loss to know against whom to bring his *præcipe*;" *per* Lord Mansfield, C.J., in *Taylor* d. *Atkyns* v. *Horde*, 1 Burr. 108; S. C. 2 Sm. L. C.

of chattel interests in land, this objection did not apply, and a term of years might be granted to commence at a future period; for the freehold is not thereby put in abeyance, but still continues in the lessor (*t*), and the seisin is in all cases regarded as quite independent of, and unaffected by the existence of any term of years (*u*).

II. Estate at will (*x*).

These observations will explain the general nature of a chattel estate. We proceed now to consider in detail each of the three kinds of chattel interests specified above; and first, as to an estate at Will.

Definition.

"Tenant at will," says Littleton (*y*), "is where lands or tenements are let by one man to another to have and to hold to him at the will of the lessor; by force of which lease the lessee is in possession." But the law implies it to be at the will of the lessee also (*z*). The tenancy may be created by express agreement, orally or in writing, or by construction of law. Thus, at common law, where the legal estate is vested in a trustee, the *cestui que trust*, let into possession of the trust estate by the trustee, is a mere tenant at will to the trustee (*a*), though in equity he is absolutely entitled; and where a lease is not in writing, when required by the Statute of Frauds (*b*) to be so, a tenancy at will is created; and so where a person is in possession of lands under a lease which is void (*c*).

Creation.

Determination.

As to what will determine a tenancy at will, Blackstone (*d*) says:—

"What act does, or does not, amount to a determination of the will on either side, has formerly been matter of great debate in our Courts. But it is now, I think, settled, that (besides the express determination of

(*t*) 1 Cruise, Dig. 226.

(*u*) Challis, R. P. 77; 1 Cruise, Dig. 224, 225 (ss. 10, 11).

(*x*) As to estates at will, see 1 Cruise, Dig. pp. 242 *et seq.*; Tudor, L. C., R. P. (in notes to *Richardson* v. *Langridge*); Wms. R. P. 442; J. W. Smith on Landlord and Tenant, Lect. I. And see the remarks of Mr. Challis (R. P. 46) to the effect, that in the earliest period of the common law the only estates less than freehold were estates at will, and that the latter class probably consisted entirely of the holdings of tenants who were not personally free. These tenancies subsequently became the more modern copyholds; and the tenancies at will considered in the text have a different origin, viz., in contract, express or implied.

(*y*) S. 68.

(*z*) Co. Litt. 55*a*.

(*a*) *Melling* v. *Leak*, 16 C. B. 669; Lewin on Trusts, p. 881; Wms. R. P. 442.

(*b*) 29 Car. II. c. 3, ss. 1, 2.

(*c*) *Denn* v. *Fearnside*, 1 Wils. 176.

(*d*) Vol. ii. 146. See also 1 Cruise, Dig. 244, 245; J. W. Smith on L. & T. Lect. I. p. 18; and Tud. L. C. R. P., p. 18.

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the lessor's will, by declaring that the lessee shall hold no longer; which must either be made upon the land, or notice must be given to the lessee) the exertion of any act of ownership by the lessor, as entering upon the premises and cutting timber, taking a distress for rent and impounding them thereon, or making a feoffment, or lease for years of the land to commence immediately; any act of desertion by the lessee, as assigning his estate to another, or committing waste, which is an act inconsistent with such a tenure; or, which is *instar omnium*, the death or outlawry of either lessor or lessee; puts an end to or determines the estate at will."

A tenancy at will is not assignable; but an assignment by the tenant at will is no determination of the tenancy as against the reversioner, unless he have notice of the assignment; in other words, a tenant at will cannot determine his tenancy by transferring his interest to a third party without notice to his landlord (*e*).

A yearly tenancy or from year to year.

An abrupt termination of a tenancy being likely to lead to much practical inconvenience on both sides, in modern times a letting at an annual rent, though payable half-yearly or quarterly, where the letting is not expressly stated to be at will, and where no certain period is limited, has been construed to be a "yearly tenancy"—that is, a tenancy from year to year, so long as it suits both parties that the holding should endure. Tenancies of this description are determinable only on formal notice to quit; and the notice which the law prescribes (in the absence of agreement) is one of at least half a year (*f*) before the expiration of the current year of the tenancy. Thus, supposing a letting from year to year, from the 1st January in any year, the notice must be given in or before the previous June, so that the lease may expire on 31st December. The notice would be bad if directed to an expiration in June, for it must expire at that period of the year at which the tenancy commenced. But a "customary half-year's"

Determinable by notice.

(*e*) *Pinhorn* v. *Souster*, 8 Ex. 763.

(*f*) "Half a year," and not "six months," is the proper expression (Patteson, J., *Doe* d. *Williams* v. *Smith*, 5 A. & E. 351). The word "month" means *lunar* month unless the contrary appear to be the meaning from the subject-matter to which that term is applied. Co. Lit. 135 (*b*) (Bayley, J., *Johnstone* v. *Huddleston*, 4 B. & C. 932; Dart, V. & P. 492). The circumstances of the parties or the contract may show that "month" means a *calendar* month, and this construction is adopted in mercantile contracts; *Hart* v. *Middleton*, 2 C. & K. 9; *Reg.* v. *Chawton*, 1 Q. B. at 250. In ecclesiastical matters "month" means *calendar* month; *Catesby's Case*, 6 Rep. 377. In Acts of Parliament passed since 1850, "month" means *calendar* month; Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 3, replacing a similar provision in 13 & 14 Vict. c. 21, s. 4; but in Acts passed before 1850 "month" means *lunar* month unless in either case the contrary intention appears.

notice is sufficient where the tenancy has commenced on one of the customary quarter-days (viz., Lady-Day, Midsummer-Day, Michaelmas-Day, and Christmas-Day); so that a notice served on 28th September to quit on the ensuing 25th March, will be sufficient in the case of a Lady-Day tenancy; but not a notice served on the 26th March to quit on the next 29th September, in the case of a Michaelmas tenancy (*g*).

The tenancy cannot be determined by one only of the parties except at the end of any number of whole years from the time it began (*h*); but it may be so determined at the end of the first year, as well as subsequent years, by proper notice, unless in creating such tenancy, the parties use words showing they contemplate a tenancy for two years at least (*i*).

A lease from year to year where the rent reserved amounts to two third parts of the improved value falls within the exception contained in the Statute of Frauds (*k*), and can therefore be made by parol, but if less rent is reserved the lease must be made by deed (*l*). Where a lease for a term by reason of the Statute of Frauds and the Act to Amend the Law of Real Property (*m*), creates at law a tenancy at will only, yet when rent has been accepted the tenancy at will is converted into a tenancy from year to year (*n*); and though a lease be void under the statutes, if the tenant enters and pays rent, he holds from year to year upon the terms of the lease in other respects (*o*). Thus, notwithstanding the positive words of the statute, what is in its inception a tenancy at will is in such cases construed as a tenancy from year to year.

Tenancy at will changed to yearly tenancy by payment of rent.

It is said (*p*) that "the words of the statute are satisfied by holding that a parol demise for more than three years creates, *in the first instance*, an estate at will strictly so called, which estate at will, when once created, may, like any other estate at will, be changed into a tenancy from year to year by payment of rent, or other circumstances indicative of an intention to create such

(*g*) *Morgan* v. *Davies*, 3 C. P. D. 260. As to the supposed origin of tenancies from year to year, see the notes to *Clayton* v. *Blakey*, 2 Sm. L. C.

(*h*) *Doe* v. *Porter*, 3 T. R. 13.

(*i*) *Doe* d. *Clarke* v. *Smaridge*, 7 Q. B. 957.

(*k*) 29 Car. II. c. 3. See *ante*, p. 142.

(*l*) *Wood* v. *Beard*, 2 Ex. D. 30.

(*m*) 8 & 9 Vict. c. 106, s. 3. See *ante*, pp. 142, 143; *post*, p. 151.

(*n*) See notes to *Doe* d. *Rigge* v. *Bell*, in 2 Sm. L. C.

(*o*) *Ib.* And see *per* Kelly, C.B., in *Martin* v. *Smith*, L. R. 9 Ex. 51.

(*p*) Notes to *Clayton* v. *Blakey*, in 2 Sm. L. C.

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yearly tenancy": and that "one of the incidents of a lease at will is its convertibility, by payment of rent, into a tenancy from year to year." "If a party enters and pays, or promises to pay, a rent certain, or settles it in account, a new agreement may be presumed, under which the landlord may have a right to distrain" (q).

Payment of rent must be in reference to a yearly holding.

But the payment of rent must be in reference to a yearly holding; if not paid with reference to a year or an aliquot part of a year, the tenancy will remain at will only (r). The reason is, that payment and receipt with reference to a yearly holding is evidence of the intention of the parties that a yearly tenancy should be created; but it is evidence only, which may be rebutted by evidence of other circumstances, showing a different intention (s).

Tenancy at will may still be created.

A tenancy at will, properly so called, may still be created by express words; and it will arise where a person holds rent free by permission of the owner—as a minister placed in possession by trustees for the congregation (t), or where a person enters under an agreement to purchase, or for a lease, and has not paid rent (u).

Form of yearly letting.

In the case of a yearly letting, the demise is expressed in some such form as the following:—

"For the term of one year from the day of , and so on from year to year until the demise shall be determined at the end of the first or any subsequent year, by either party giving to the other calendar months' previous notice in writing (x)."

But for the words "until, &c." such lease would enure as a demise for two years certain from the commencement (y).

Yearly tenancy not determined by assignment or death.

Waste.

Unlike a tenancy at will, a tenancy from year to year does not determine by an assignment (z), or by the death of either of the parties. As to waste, both tenants at will and tenants from year to year are liable for voluntary waste, and perhaps for permissive waste (that is, letting the property fall out of repair (zz)), and a

(q) *Per* Tindal, C.J., *Regnart* v. *Porter*, 7 Bing. 453.

(r) *Richardson* v. *Langridge*, 4 Taunt. 128; S. C., 2 Sm. L. C.

(s) See notes to *Clayton* v. *Blakey*, 2 Sm. L. C.

(t) Tudor, L. C. R. P. p. 12.

(u) Dart, V. & P. 504, 505; *ib.* 1085.

(x) Dav. Conc. Prec. No. lxxxv. p. 314.

(y) *Denn* v. *Cartwright*, 4 East, 32.

(z) *i.e.*, the lessor at will having notice (*Pinhorn* v. *Souster*, 8 Ex. 772). As to its assignability, see *per* Jessel, M.R., in *Allcock* v. *Moorhouse*, 9 Q. B. D. 371.

(zz) *Post*, p. 155.

tenant from year to year is bound to keep the house in weather-tight condition (*a*).

Notice under Agricultural Holdings Act.

Under the Agricultural Holdings Act, 1883, the half year's notice of which we have spoken is altered into a year's notice in the case of holdings wholly agricultural or wholly pastoral, or in part agricultural, and as to the residue pastoral, or in whole or in part cultivated as a market-garden, except holdings let to the tenant during his continuance in any office, appointment, or employment held under the landlord. The Act provides :—

> S. 33. "Where a half-year's notice, expiring with a year of tenancy, is by law necessary and sufficient for determination of a tenancy from year to year, in the case of any such tenancy under a contract of tenancy made either before or after the commencement of this Act, a year's notice so expiring shall, by virtue of this Act, be necessary and sufficient for the same, unless the landlord and tenant of the holding by writing under their hands, agree that this section shall not apply, in which case a half-year's notice shall continue to be sufficient; but nothing in this section shall extend to a case where the tenant is adjudged bankrupt, or has filed a petition for a composition or arrangement with his creditors (*b*)."

III. Estate for years.

Definition.

An estate for years is thus defined by Blackstone :—

"An estate for years is a contract for the possession of lands or tenements for some determinate period; and it takes place where a man letteth them to another for the term of a certain number of years, agreed upon between the lessor and the lessee, and the lessee enters thereon (*c*)."

He continues (*d*)—

"These estates were originally granted to mere farmers or husbandmen, who every year rendered some equivalent in money, provisions, or other rent, to the lessors or landlords; but, in order to encourage them to manure (*e*) and cultivate the ground, they had a permanent interest granted them, not determinable at the will of the lord. And yet their possession was esteemed of so little consequence, that they were rather considered as the bailiffs or servants of the lord, who were to receive and account for the profits at a settled price, than as having any property of their own. And therefore they were not allowed to have a freehold estate: but their interest (such as it was) vested after

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(*a*) J. W. Smith, L. & T. 295, 296.

(*b*) 46 & 47 Vict. c. 61, ss. 33, 54. The section does not apply where there is an express provision for six months' notice; *Barlow* v. *Teal*, 15 Q. B. D. 403, 501; *Wilkinson* v. *Calvert*, 3 C. P. D. 360.

(*c*) Vol. ii. 140; Co. Litt. 43*b*.

(*d*) 2 Bl. 141.

(*e*) "Manure" in this connexion appears to be synonymous with "cultivate;" see Elph. N. & C. Interp. 571, note (*b*), and Co. Litt. 145*b*, who speaks of "*goods* taken" (*i.e.*, hired) "to manure his lands," meaning instruments of husbandry.

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their deaths in their executors, who were to make up the accounts of their testator with the lord, and his other creditors, and were entitled to the stock upon the farm. The lessee's estate might also, by the ancient law, be at any time defeated, by a common recovery suffered by the tenant of the freehold (*f*)."

Entry.

It will be observed, that in Blackstone's definition of an estate for years, it is treated as a condition of the creation of the estate, that the lessee should enter on the lands under the contract. This is due to the fact that such interests in land were, in the earlier history of the law, regarded as being in the nature of a personal contract only between the lessor and the lessee (*g*). And, even after it was held that they were actual estates in the land, it was not until the contract was followed up by the taking possession under it, that the estate in the lands was considered to arise (*h*). But although before entry no action could be maintained by the lessee for a trespass to the lands, yet the law recognised that he had an assignable interest—called an *interesse termini* (an 'interest in the term'), which was capable of being transferred or granted over to another (*i*). But if the lease were made by a conveyance operating by virtue of the Statute of Uses (of which hereafter), the lessee would have the whole term vested in him as if he had actually entered (*k*).

Interesse termini.

In the words of Bayley, J. (*l*) :—

"The right upon a lease to commence *in præsenti* is (except under the Statute of Uses) until entry an *interesse termini* only: and so is the right upon a lease to commence *in futuro;* and the same rules are applicable to both. Each is a *right* only, not an *estate*. The whole *estate*, notwithstanding such right, is in the lessor."

No livery.

Requirements of Statute of Frauds and Act to Amend Law of Real Property.

So completely was the principle that a lease was a mere contract recognised at common law, that, while the creation or transfer of a freehold estate in lands required livery of seisin or a fine, or recovery, or deed of grant, according to the nature of the subject-matter, an estate for years, however long its duration—say even for a thousand years—might, down to the passing of the Statute of Frauds (*m*) in the reign of Charles II.,

(*f*) *Flower* v. *Rigden*, Cro. El. 284; *Pledgard* v. *Lake*, Cro. El. 718; Co. Litt. 46*a*; 2nd Instit. 321; Stat. Gloucester, 6 Ed. I. c. 11; 21 H. VIII. c. 15.

(*g*) *Supra*, p. 16.

(*h*) 1 Cruise, Dig. 224 (s. 10); J. W. Smith, Landl. & Ten. p. 14.

(*i*) Co. Litt. 46*b*; *ib.* 270*b*.

(*k*) 1 Cruise, Dig. 225 (s. 14).

(*l*) *Doe* d. *Rawlings* v. *Walker*, 5 B. & C. 111, at p. 118.

(*m*) 29 Car. II. c. 3.

have been created by mere agreement, not necessarily in writing, but verbally, or, as it is termed, by parol (*n*), provided only it was accompanied or followed up by actual entry. That statute, however, so far as regarded leases of more than three years, imposed the restriction that no such lease should be effectual unless put into writing and signed by the party, or his agent lawfully authorised in writing. A statute of the present reign, entitled "an Act to amend the Law of Real Property" (*o*) has added the further restriction that a lease required by law to be in writing (made after 1st October, 1845) shall be void unless made by deed. But though an instrument be void as a lease, as not being by deed, it may be good as an agreement, and where possession has been given, the tenant will hold under the same terms as if a lease had been granted (*p*).

Limitation.

It is usual to limit an estate for years to a man and his "executors and administrators"; but it is sufficient if it be granted to himself only, without mention of his personal representatives; for in them, on his death, the law will vest it without any special words of limitation (*q*).

Estoppel.

One somewhat peculiar result flowed out of the doctrine that a lease for years is a contract. It was considered to be equitable that a lessor who had contracted to grant a lease to another should be considered as warranting to him the possession of the lands under the contract; and similarly that he who had taken the benefit of the possession should not be allowed as against his landlord to dispute his title to grant the lease. This view the law works out, in the case of a lease by indenture, by means of a doctrine called "estoppel," which neither allows the lessor to dispute the grant, nor the tenant to deny his title to make it; and this, even where the grantor had not in fact either the lands or the title at the time of the lease. The principle of "estoppel" is, that what a man has affirmed or represented to be the truth, shall not

(*n*) "By parol" is sometimes used to describe a transaction effected otherwise than by deed, whether it be verbal or by an instrument in writing, but not sealed and delivered. See *e.g.*, *Rann* v. *Hughes*, 7 T. R. 350; where it is said that all contracts are according to the law of England either agreements by specialty (*i.e.*, deed) or agreements by parol.

(*o*) 8 & 9 Vict. c. 106, s. 3.

(*p*) *Parker* v. *Taswell*, 2 De G. & J. 559. And since the Judicature Act, an agreement for a lease *of which specific performance would be granted* appears to be equivalent to an actual lease; see *Walsh* v. *Lonsdale*, 21 Ch. D. 9; *Allhusen* v. *Brooking*, 26 Ch. D. 559; *Lowther* v. *Heaver*, 41 Ch. D. 248; *Swain* v. *Ayres*, 21 Q. B. D. 289.

(*q*) Wms. Exors. 1730; Wms., Pers. P. 348.

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be contradicted by him or by those claiming through him, to the injury of those who have acted on the faith of the representation (*r*).

Term.

Certain beginning.

Certain ending.

The definition of an estate for years requires the interest to be for some fixed period. Such an interest is ordinarily styled a "term," from the Latin word *terminus*, which, as Coke says, "doth not only signify the limits and limitation of time, but also the estate and interest that passeth for that time;" and he adds that "regularly in every lease for years the term must have a certain beginning and a certain end (*s*)." The period may be fixed by reference to a date antecedent to the date of the making of the lease, or it may commence from a future time, as a lease for a hundred years from next Easter (*t*); but it must be for a term of years. As we have seen, a tenancy for life, or for the life or lives of another or others, is an estate of freehold (*u*); but a lease to A. for ninety-nine years (or any other term of years, however long), "should he so long live," gives him only a chattel real.

Surrender (*x*).

A term of years may be destroyed by either "surrender" or "merger."

"Surrender" is the yielding up of the term itself (*y*) to the immediate reversioner, that is the person out of whose interest it is carved, or who has a right to the possession immediately expectant on its cesser or determination (*z*). This surrender may be either by the act of the party or by implication of law—the one being styled a surrender "in fact," the other a surrender "in law." A surrender in fact takes place on any voluntary yielding up of the term; a surrender in law may be effected by the creation of a new interest inconsistent with the continuance of the

(*r*) Not as Lord Coke says (Co. Litt. 352*a*), "it is called an estoppel because a man's own act or acceptance stoppeth or closeth up his mouth to allege or plead the truth," for which reason it has been said to be "odious," and that it ought to be construed strictly; see *Cuthbertson* v. *Irving*, 4 H. & N. 742, and notes to *Spencer's Case*, in 1 Smith's L. C. See also as to estoppel, *per* Jessel, M.R., in *Re Stringer*, 6 Ch. D. 1; Elph. Introd. 66; and, as to estoppel by recital, Elph. N. & C. Interp. 140 *et seq.*

(*s*) Co. Litt. 45*b*.

(*t*) A reversionary lease is a mere *interesse termini* during the existence of the prior interests; see *e.g.*, *Doe* d. *Rawlings* v. *Walker*, 5 B. & C. 111.

(*u*) Leases for a life or lives at a rent are sometimes met with, and were formerly very common. The interest of the tenant under them is a freehold and not a term.

(*x*) As to surrender, see Challis, R. P. 67.

(*y*) There can be no surrender strictly speaking of an *interesse termini*, for it is not an *estate*; see *Doe* d. *Rawlings* v. *Walker*, 5 B. & C. 111; 1 Cruise, Dig. 237; J. W. Smith, L. & T. 15, note.

(*z*) Co. Litt. 337*b*; see, as to reversion, *post*, chap. viii.

old estate, as when the tenant himself accepts a fresh lease to commence before the expiration of the original one (*a*). The mere consent of the tenant to the grant to a stranger of a new lease to commence before the expiration of the existing lease would appear to have the same effect, provided it were accompanied with an actual giving up of the possession (*b*).

By the Act to Amend the Law of Real Property (*c*), it is provided that a surrender in writing of an interest in any tenements or hereditaments, not being a copyhold interest, and not being an interest which might by law have been created without writing, shall be void at law unless made by deed.

Leases belonging to infants (*d*) and to married women may, under the direction of the Chancery Division of the High Court, be surrendered and new ones granted (*e*); and leases belonging to lunatics may, under the direction of the Judge in Lunacy, be surrendered by their committees and new ones taken for their benefit (*f*).

Merger (*g*).

"Merger" takes place when there is an acquisition by the lessee of another estate inconsistent with the existence of the term, provided that there is no intervening estate (*h*). Says Blackstone (*i*):—

> "Whenever a greater estate and a less coincide and meet in one and the same person, without any intermediate estate, the less is immediately annihilated; or, in the law phrase, is said to be 'merged,' that is, sunk or drowned, in the greater."

Thus, where the "termor" (that is, the person in whom the term is vested) acquires an estate of freehold in the land, even an estate for life (which, as we have seen, is larger than any term of years however long), if that estate be the reversionary interest immediately expectant on the determination of the term, a merger

(*a*) Co. Litt. 338*a*; *Davison* v. *Stanley*, 4 Burr. 2210; *Lyon* v. *Reed*, 13 M. & W. 285; J. W. Smith, L. & T. 355; but a mere agreement for a new lease will not operate as a surrender; *Ibid.*, 356.

(*b*) *Nickells* v. *Atherstone*, 10 Q. B. 944; *M'Donnell* v. *Pope*, 9 Hare, 706; and see *Phené* v. *Popplewell*, 12 C. B., N. S. 334, 341 (cited in J. W. Smith, L. & T. 364).

(*c*) 8 & 9 Vict. c. 106, s. 3; see also s. 9, *post*.

(*d*) See *In re Griffiths*, 29 Ch. D. 248.

(*e*) 11 Geo. IV. & 1 Wm. IV. c. 65, s. 12, and Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 34. As to the power of tenants for life under the Settled Land Act to surrender, see *ante*, p. 52.

(*f*) 53 Vict. c. 5, s. 120.

(*g*) Challis, R. P. 66.

(*h*) *Doe* d. *Rawlings* v. *Walker*, 5 B. & C. 111, at p. 120.

(*i*) Vol. ii. 177; and see, on the doctrine of merger, the remarks of Bayley, J., in *Doe* d. *Rawlings* v. *Walker*, 5 B. & C. 111, at p. 120.

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takes place. So even if the reversion be only another term of years, and the lessee becomes possessed of that reversionary term, the first term merges in the reversionary term. Thus, if a term be granted to A., and another term, to commence after the expiration of A.'s term, be granted to B., then, if A. acquires B.'s term, the first term would merge in the second. This would take place even were the second term of a shorter duration than the first. Thus, let A.'s term be for 1000 years, and B.'s term for 500 years only, the 1000 years term would nevertheless merge in the 500 years term (*k*).

There is, however, a qualification of this doctrine of merger, viz., that the union in the same individual of both estates must be in the same right. Says Blackstone (*l*):—

> If the freehold be in his own right, and he has a term in right of another (*en autre droit*), there is no merger. Therefore, if tenant for years dies, and makes him who hath the reversion in fee his executor, whereby the term of years vests also in him, the term shall not merge; for he hath the fee in his own right, and the term of years in the right of the testator subject to his debts and legacies. So also, if he who hath the reversion in fee marries the tenant for years there is no merger; for he hath the inheritance in his own right, the lease in the right of his wife."

But at common law this qualification of the doctrine extended to those instances only in which one person had the legal ownership in different rights, and in which common law, as distinguished from equity, took notice that he held in different rights. Of different rights in respect of the mere beneficial or equitable ownership the common law did not for this purpose take any notice. Therefore, at law, notwithstanding one of two legal estates was held in trust and the other was held beneficially by the same person, the doctrine of merger took effect (*m*), but equity would

(*k*) See 6 Cruise, Dig. 475 (s. 37), who observes that "an estate in reversion is considered greater than an estate in possession, though in other respects equal; and with regard to terms for years, though the term in reversion be of smaller duration." It was formerly contended that one term would not merge in another term, or, as Coke says (Co. Litt. 273*b*), that "one chattel cannot drown another, and years cannot be consumed in years;" but the contrary is settled law: see *Stephens* v. *Bridges*, 6 Madd. 66; 1 Cruise, Dig. 240.

(*l*) Vol. ii. 177. See *Chambers* v. *Kingham*, 10 Ch. D. 743.

(*m*) Preston on Conv., vol. iii. p. 315. And see 6 Cruise, Dig. 466 *et seq.* Merger is there defined as "The annihilation by act of law of the less in the greater of two vested estates, meeting, without any intervening estate, in the same person, in the same right; or, if in different rights, meeting in the same person by act of the party and not by mere act of law, and so that the person

interpose to support the trust. And now by the Judicature Act, 1873 (*n*), it is enacted:—

> S. 25, § 4. "There shall not after the commencement of this Act" (1st November, 1875) "be any merger by operation of law only of any estate, the beneficial interest in which would not be deemed to be merged or extinguished in equity."

Botes. Estovers. Waste.

In treating of an estate for life, it was pointed out (*o*) that the tenant for life, notwithstanding his limited interest, has a right to take wood, and other materials produced by the land, for fuel, repairs, and the like, under the name of "estovers" or "botes"—that is to say, house-bote, fire-bote, plough-bote, and the like (*p*); and is also liable to waste. The same rights and the like liability in respect to waste are extended to the tenant for years; but it is doubtful whether he is liable for permissive waste (that is, letting the buildings fall into disrepair) in the absence of stipulation (*q*).

Emblements.

The tenant for years, like the tenant for life, was by the common law entitled to emblements when the determination of his term was caused by an uncertain event, as the death or cesser of the estate of a lessor who was himself tenant for life or for any other uncertain interest, though not if the term expired by effluxion of time or was determined by the act of the lessee himself. For, where he could have no certain guide whether to sow the land or not, it is only just to him that he should have the crops; in the other case, the period of expiration being known, it was considered to be his own folly if he sowed when aware that he was not to reap the harvest (*r*). By 14 & 15 Vict. c. 25, it is provided that "when the lease or tenancy of any farm or lands held by a tenant at rack rent (*i.e.*, ordinary current rent of the full value), shall determine by the death or cesser of the estate of any landlord

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in whom the estates thus meet in different rights by act of the party, shall have an absolute power of alienation over both estates."

(*n*) 36 & 37 Vict. c. 66.

(*o*) *Ante*, ch. ii., p. 39.

(*p*) See as to these, Williams on Rights of Common, p. 18.

(*q*) It seems that no distinction can be drawn for this purpose between the case of tenant for life and that of tenant for years: *Yellowly* v. *Gower*, 11 Ex. 274; J. W. Smith on L. & T. 296; but it has recently been held by Kay, J. (in *Re Cartwright, Avis* v. *Newman*, 41 Ch. D. 532), that, in the absence of express provision, a tenant for life is not liable for permissive waste, and on the other hand, by Kekewich, J. (in *Davies* v. *Davies*, 38 Ch. D. 499), that a tenant for years is liable for such waste. See also *per* Lush, J., in *Woodhouse* v. *Walker*, 5 Q. B. D. 407 (a case of tenant for life).

(*r*) Co. Litt. 55*ab*; 1 Cruise Dig. 233 (s. 18) As to emblements, see *ante*, p. 17.

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entitled for his life or for any other uncertain interest, instead of claims to emblements, the tenant shall continue to hold and occupy such farm or lands until the expiration of the then current year of his tenancy."

Use and occupation.

A contract to pay a fair compensation by way of rent, is implied by law from the fact that lands or tenements belonging to one person have been occupied by another under an agreement with the former. Where the tenancy is created by simple contract, that is, otherwise than by deed, an action lies for what is called "use and occupation," and the fair and reasonable value of the same will be recoverable; generally, however, the amount of rent and time of payment are determined by express agreement, which is put in writing (*s*). And the lease is expressly made subject to the payment of the rent and the observance and performance of certain covenants, amongst which a covenant to pay the rent during the whole term, is included (*t*). Thus, says Mr. J. Williams (*u*):—

Original lessee liable for rent, &c., after assignment.

"The rent and covenants are constantly binding on the lessee (*x*), during the whole continuance of the term, notwithstanding any assignment which he may make. On assigning leasehold premises, the assignee is therefore bound to enter into a covenant with the assignor, to indemnify him against the payment of the rent reserved, and the observance and performance of the covenants contained in the lease. The assignee, as such, is liable to the landlord for the rent which may be unpaid, and for the covenants which may be broken during the time that the term remains vested in him, although he may never enter into actual possession, provided that such covenants relate to the premises let; and a covenant to do any act upon the premises, as to build a wall, is binding on the assignee, if the lessee has covenanted for himself *and his assigns* to do the act. But a covenant to do any act upon premises not comprised in the lease cannot be made to bind the assignee. Cove-

Assignee liable until he assigns over.

(*s*) There was at common law an action of debt for use and occupation; and under 11 Geo. II. c. 19, an action of *assumpsit;* see J. W. Smith, L. & T. 199 *et seq.;* and Roscoe, N. P. 303.

(*t*) The common form of the covenant is that the lessee covenants that he, the lessee, his executors, administrators, or assigns, during the said term, will pay the rent. "This," said Lord Esher, M.R. (in *Baynton* v. *Morgan*, 22 Q. B. D. 74, where the covenant was in similar terms), "is a direct promise that certain sums of money shall be paid as rent on certain days during a certain period." See the form of the covenant in Dav. Conc. Prec. lxxxvi. p. 318.

(*u*) Wms., R. P. 449.

(*x*) *Smyth* v. *North*, L. R. 7 Ex. 242; Elph. Introd. 218. Note the distinction between the liability of the lessee by reason of the express covenant and his liability by reason of privity of estate. It was held that if the lessor accepted an assignee as his tenant, he could not afterwards bring an action of debt for rent against the lessee; but he could sue him on his express covenant: see note to *Thursby* v. *Plant*, 1 Wms. Saund. 241.

nants which are binding on the assignee are said to *run with the land*, the burthen of such covenants passing with the land to every one to whom the term is from time to time assigned. But when the assignee assigns to another, his liability ceases as to any future breach. In the same manner the benefit of covenants relating to the land, entered into by the lessor, will pass to the assignee; for, though no contract has been made between the lessor and the assignee individually, yet, as the latter has become the tenant of the former, a 'privity of estate' is said to arise between them, by virtue of which the covenants entered into, when the lease was granted, become mutually binding, and may be enforced by the one against the other. This mutual right is also confirmed by an express clause of the statute (*y*), by which assignees of the reversion were enabled to take advantage of conditions of re-entry contained in leases. By the same statute also, the assignee of the reversion is enabled to take advantage of the covenants entered into by the lessee with the lessor, under whom such assignee claims."

Covenants which run with the land.

Privity of estate.

When it is said that covenants "run with the land," what is meant is that they are considered by the law to be annexed or appurtenant to, and to pass with the *estates* in the land. The doctrines upon this subject appear to be connected with the distinction between covenants real and covenants personal. "Covenants real are those which have for their object something annexed to, or inherent in, or connected with, land or other real property," and "the essential difference between a real and a personal covenant is that a real covenant runs with the land (*z*)." A covenant which runs with the land has been defined to be "such a covenant as would be binding on the assignee of the lessee and which the assignee of the lessor might enforce (*a*); or as one which follows the reversion and the lease, let them go where they will (*b*); the principle being that the covenant relates to the subject-matter of the lease and is such as to be beneficial to the estate of the lessor or of the lessee as the case may be (*c*).

Covenants real—personal.

A covenant of this nature may be entered into by either the lessor or the lessee, and its effect in either case is to impose an obligation on the covenantor and to confer a corresponding right on the covenantee. When it is said that a covenant runs "with

(*y*) 32 Hen. VIII. c. 34, s. 2.

(*z*) 4 Cruise, Dig. 371, s. 23; *ib.* 372, s. 27.

(*a*) *Per* Abbott, C.J., *Vernon* v. *Smith*, 5 B. & Ald. 1.

(*b*) See Wilmot, C.J., *Bally* v. *Wells*, cited (from Wilmot's Notes) in 5 B. & Ald. pp. 3, 7.

(*c*) See *per* Best, J., *Vernon* v. *Smith*, 5 B. & Ald. 10; Shep. Touch. 176 (where they are called "inherent covenants, *i.e.*, such covenants as do concern the thing granted, and tend to the supportation of it, as, to keep the houses demised in good reparations, or the like").

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the land," what is meant, if it is the lessee's covenant, is that the burden of it, *i.e.*, the obligation to perform it, is annexed to the lessee's estate in the land; if it is the lessor's covenant, that the benefit of it, *i.e.*, the right to enforce it, is annexed to the lessee's estate. Where the benefit of a lessee's covenant or the burden of a lessor's covenant, is annexed to the estate of the lessor, so that the lessor's assign acquires the right to enforce the covenant or the obligation to perform it, as the case may be, such covenant is said to "run with the reversion." By the "land," as distinguished from the reversion, is meant the thing demised by the lease. But the expression "covenant running with the land," is sometimes used to express merely the nature of the covenant, that is to say, that it is of the nature of a real covenant, whether the burden of it be annexed to the land or to the reversion, or, in other words, whether the covenantor be lessee or lessor. For example, a covenant to repair the demised premises is a covenant which runs with the land, and it may be entered into by either the lessee or the lessor. If the lessee covenants, the burden of the covenant runs with the land, *i.e.*, the estate of the lessee, and the benefit of it with the reversion, *i.e.*, the estate of the lessor; if the lessor covenants, the burden runs with the reversion, and the benefit with the land (*d*).

Covenants which run with the reversion.

Covenants running with the land.

On the subject of covenants running with the land, the Real Property Commissioners, in their third Report, said:—

"The authorities lay down, 1st, that, in order to make a covenant run strictly with the land, so as to bind the assignee, or give him the benefit without his being named, it must relate directly to the land, or to 'a thing in existence parcel of the demise': 2ndly, that, where it respects a thing not in existence at the time, but which, when it comes into existence, will be annexed to the land, the covenant may be made to bind the assigns by naming them, but will not bind them unless named; and 3rdly, that when it respects a thing not annexed, nor to be annexed, to

Assigns not named.

Assigns named.

(*d*) It may be pointed out that at law the lessee's covenants bind only persons in whom the very estate of the lessee is vested, and not those who are assigns of the equitable interest only (*e.g.*, a person who is in possession under a mere agreement by the lessee to assign to him; *Cox* v. *Bishop*, 8 De G. M. & G. 815); nor a sub-lessee, for he does not take the estate of the original lessee, but only an interest derived out of it. In equity, however, a lessor may be entitled to enforce covenants against a person who is not a legal assign of the lessee's estate, but who derives his title to the possession from the lessee with notice of the existence of the covenant: see *Luker* v. *Dennis*, 7 Ch. D. 227; and, as to underlessees, *Hall* v. *Ewin*, 37 Ch. D. 74.

See, as to covenants in leases running with land, Articles in 31 Sol. Journ. pp. 212, 229.

the land, or a thing collateral, or in its nature merely personal, the covenant will not run, that is, it will not bind the assignee nor pass to him even though he is named (*f*)."

"These rules appear to have been originally laid down with reference to leases; but authorities are not wanting, in which they have been treated as applying equally to cases not involving the relation of landlord and tenant (*g*). They are usually laid down as constituting the

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(*f*) These rules are laid down in *Spencer's Case*, 5 Rep. 16; 1 Sm. L. C.

(*g*) The case of covenants as between lessor and lessee must be distinguished from that of covenants entered into as between owners in fee simple: see Dart, V. & P. 862. The burden of a covenant entered into by the owner in fee of one piece of land with the owner in fee of another piece of land, or by the owner of land subject to a rent-charge, with the owner of the rent, cannot run *at law* with the land so as to bind the assigns of the covenantor: *Austerberry* v. *Corporation of Oldham*, 29 Ch. D. 750; *Haywood* v. *Brunswick Building Society*, 8 Q. B. D. 403; 1 Smith, L. C., 9th ed., 105, and the cases there cited. (It must, however, be remembered that a provision in the form of a covenant may really amount to the grant of an easement or a *profit à prendre*: *Holmes* v. *Seller*, 3 Lev. 305; *Lord Mountjoy's Case*, 1 Anders. 307; *Northam* v. *Hurley*, 1 El. & Bl. 665; *Rowbotham* v. *Wilson*, 8 H. L. C. 348, and in this case the person who appears to be the covenantee and his assigns are entitled to the easement by virtue of the grant.) Where, however, the covenant is a restrictive or negative covenant: *i.e.*, a covenant not to do something on the land (*London & South Western Railway Co.* v. *Gomm*, 20 Ch. D. 562; *Haywood* v. *Brunswick Building Society*, 8 Q. B. D. 403); as, for example, not to build on it, or not to carry on specified trades on it, the assign of the purchaser taking *with notice* will be restrained in equity from breaking it (*Tulk* v. *Moxhay*, L. R. 2 Ch. 774; *Catt* v. *Tourle*, L. R. 4 Ch. 654; *Zetland* v. *Hislop*, 7 App. Ca. 427), on the principle that a person will not be allowed to use land in a manner inconsistent with a contract entered into by a person through whom he claims and of which he has notice. A covenant of this nature is not open to objection on the ground that it offends against the rules as to perpetuities (*ante*, p. 97), *London & South Western Railway Co.* v. *Gomm*, 20 Ch. D. 562; see *Mackenzie* v. *Childers*, 43 Ch. D., 265, at p. 279.

The benefit of a covenant cannot run either at law or in equity with land or a rent-charge unless it is really connected with the enjoyment of land or rent: *Ackroyd* v. *Smith*, 10 C. B. 164; *Bailey* v. *Stephens*, 12 C. B., N. S. 91; *Ellis* v. *Mayor of Bridgnorth*, 15 C. B., N. S. 52; *Austerberry* v. *Corporation of Oldham*, 29 Ch. D. 776.

At law no person is entitled to the benefit of a restrictive covenant unless he is in of the same estate as, *i.e.*, claims under, the original covenantee; so that, if the estate of the covenantee is defeated by an appointment under an overriding power, the appointee is not entitled to enforce the covenant; *Roach* v. *Wadham*, 6 East, 289 (see this discussed in the notes to *Spencer's Case*, 1 Smith, L. C.). In equity, however, if the intention that the appointee is to enjoy the benefit of the covenant is clear, this distinction will be disregarded. It is by no means clear whether a purchaser from the covenantee will be able to enforce the covenant unless it appears from his conveyance that it is intended that he should be able to do so: *Renals* v. *Cowlishaw*, 9 Ch. D. 125; 11 Ch. D. 866.

Occasionally on the sale of a building estate in lots each purchaser enters into restrictive covenants with the vendor; where this is the case, each purchaser can enforce the covenants of the other purchasers if the restrictions were entered into for his benefit, but not if they were entered into for the benefit of the vendor only: *Nottingham Patent Brick and Tile*

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whole of the settled law on the subject, and appear to apply equally, whether we consider the burthen, or whether we consider the benefit of covenants."

Where it is necessary to name the assigns of the covenantor in order to bind them, the covenant has usually been framed thus :—

"The said (covenantor) doth hereby for himself, his heirs, executors, administrators, *and assigns*, covenant with the said (covenantee), his executors, administrators, and assigns, that he the said (covenantor), his executors, administrators, or assigns, will, &c."

Benefit of covenant.

By the Conveyancing and Law of Property Act, 1881 (*i*), a covenant relating to land of inheritance is to be deemed to be made with the covenantee, his heirs and assigns, and to have effect as if heirs and assigns were expressed; and similarly a covenant relating to land not of inheritance is to be deemed to be made with the covenantee, his executors, administrators, and assigns, and to have effect as if executors, administrators and assigns were expressed. Similarly it is enacted (*k*) that (if and as far as a contrary intention is not expressed), a covenant, though not expressed to bind the heirs, shall operate in law to bind the heirs and real estate, as well as the executors and administrators, and personal estate, of the person making the same, as if heirs (*l*) were expressed.

Burden.

The result is that it is not necessary either in the case of the covenantor or of the covenantee to mention the heirs, executors,

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Co. v. *Butler*, 15 Q. B. D. 261; 16 Q. B. D. 778. In the former case the vendor will, if such is the intention, be unable to release the purchasers from their covenants: *Martin* v. *Spicer*, 34 Ch. D. 1; S. C. *sub nom. Spicer* v. *Martin*, 14 App. Ca. 12; but if the nature of the property becomes so far changed as to render it inequitable to enforce the covenants the Court will decline to do so: *Duke of Bedford* v. *Trustees of British Museum*, 2 M. & K. 552; *Sayers* v. *Collyer*, 24 Ch. D. 180; 28 Ch. D. 103.

See, on all the questions considered in this note, 1 K. and E. 3rd edit. 302, 324; 31 *Solicitors' Journal*, 250, 265, 281, 298; the notes to *Spencer's Case*, 1 Smith, L. C.; S. C., 5 Rep. 16. In that case the lessee had covenanted "for him, his executors and administrators"—not saying "*and assigns*"—that he, "his executors, administrators *or assigns*" would build a wall on the land demised: and it was held that this form of covenant was not binding on assigns; though, if the lessee had expressly covenanted *for* his assigns, they would have been bound, the covenant being to do an act on the premises demised.

(*i*) 44 & 45 Vict. c. 41, s. 58.

(*k*) S. 59.

(*l*) It was never necessary, though usual, to mention executors and administrators, for they were bound at common law. (Wms. Exors. 1730.) Observe that this provision does not make the mention of the "assigns" of the covenantor unnecessary in cases where they are not bound unless named.

administrators, or assigns, except in cases where, before the Act, it was necessary to mention the assigns of the covenantor in order to make the burden of the covenant run with the land. But these provisions apply only to covenants made after 1881.

Burden of lessee's covenants.

The rules as to what covenants run with the land so as to bind assignees of the lessee's estate are laid down in *Spencer's Case* (*m*), the effect of which is embodied in the extract above given from the Report of the Real Property Commissioners; and the common law upon this question remains untouched by statute (*n*).

Benefit of lessor's covenants.

As to the right of the assignee of a lease to the benefit of a lessor's covenant, relating to the subject-matter of the demise, it appears that such covenants ran with the land at common law (*o*); and, as to leases made after 1881, the matter is regulated by the Conveyancing Act, 1881 (*p*), which enacts that "the obligation of a covenant entered into by a lessor with reference to the subject-matter of a lease may be taken advantage of and enforced by the person in whom the term is from time to time vested by conveyance, devolution in law, or otherwise."

Benefit of lessee's covenants.

As to the rights and obligations of an assignee of the reversion, in other words, as to how far covenants run with the reversion, we will first consider the assignee's right to the benefit of, *i.e.*, his right to enforce, the lessee's covenants, in other words, whether the benefit of a lessee's covenant runs with the reversion.

At common law only the lessor himself or his heir could take the benefit of the lessee's covenants (*q*).

"Covenants real descend to the heirs of the grantors, who may at any time bring an action upon them, though not named, as in the case of *Lougher* v. *Williams* (*r*). But no stranger could take advantage of a covenant of this kind; so that the grantees of reversions could not enforce the performance of any covenants contained in leases made by

(*m*) 5 Rep. 16; S. C., 1 Sm. L. C.

(*n*) Under s. 59 of the Conveyancing Act, 1881, covenants (in deeds after 1881) bind the heirs, as well as the executors and administrators, without expressly naming them: but the section does not make covenants binding on assigns. It is therefore still necessary for the lessee to covenant expressly for himself and his *assigns* where it is wished that the burden of his covenant should run with the land, in cases where before 1882 it was necessary for him to covenant in that manner for that purpose. See *supra*, p. 158.

(*o*) See the 4th and 6th Resolutions in *Spencer's Case, ubi sup.*; and 4 Cruise, Dig. 372, ss. 30, 31.

(*p*) 44 & 45 Vict. c. 41, s. 11.

(*q*) J. W. Smith, L. & T. 449 *et seq.* See the preamble to statute 32 Hen. VIII. c. 34, cited in 1 Wms. Saund. 238, note (2); and see *ib.* 240, note (3).

(*r*) 2 Lev. 92.

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32 Hen. 8, c. 34.

the persons under whom they derived. To remedy this, the statute 32 Hen. 8, c. 34, was made . . . . . it being thereby enacted that the grantees and assignees of reversions shall have such like and the same advantages, by action only, for not performing the covenants in the said leases, as the lessors or grantors themselves or their heirs or successors might have had" (*t*).

Though the words of the statute 32 Hen. 8, c. 34, are general, the Courts have construed them as including only covenants which touch and concern the thing demised, *i.e.*, covenants which run with the land (*u*).

Attornment.

Formerly, in order to complete the title of an assignee of the reversion as against the tenant, so as to enable him to sue the tenant on his covenants, it was necessary that the tenant should attorn to the reversioner, *i.e.*, should acknowledge that he held of him (*x*); and, notwithstanding the statute 32 Hen. 8, c. 34, attornment was still necessary in order to enable the assignee to sue the tenant until the statute 4 Anne, c. 16 (s. 9), which made the assignment valid without attornment, but at the same time (s. 10) protected any lessee who paid rent to the lessor without having had notice of the assignment of the reversion. Its operation was to complete the title of the assignee and to protect the tenant against the breach of a condition for payment of rent (*y*), *i.e.*, by requiring notice to the tenant in lieu of attornment.

Destruction of immediate reversion.

It should here be noticed that at common law the right to enforce the lessee's covenants was regarded as annexed to the original reversion, *i.e.*, the estate out of which the lessee's term was derived, and it followed that, if that reversion by any means ceased to exist, the right annexed to it was destroyed. Thus, if A. seised in fee granted a lease for ninety-nine years to B., and B. then granted an underlease for a shorter term to C., the covenants entered into by C. were incident to the immediate reversion, *i.e.*, to B.'s term. Now if B. surrendered his term to A., or if A. conveyed

(*t*) 4 Cruise, Dig. 375, s. 41; for the words of the statute, see 1 Wms. Saund. 238, 239. See the Act discussed Co. Litt. 215*a*. It applies only to leases by deed; *Standen* v. *Christmas*, 10 Q. B. 135.

(*u*) J. W. Smith, L. & T. 452. This was so held in *Spencer's Case*, 5 Rep. 18*a*; 1 Sm. L. C.; see 4 Cruise, Dig. 376.

(*x*) As to attornment see Co. Litt. 309*a*; Wms., R. P. 287; J. W. Smith, L. & T. 446.

(*y*) See *Moss* v. *Gallimore*, 1 Sm. L. C. 111; *Scaltock* v. *Harston*, 1 C. P. D. 106, 110; where it was held that it is not necessary to give notice to the lessee of the assignment of the reversion in order to enable the assignee to re-enter for breach of a covenant to repair.

his reversion in fee to B., B.'s term would be merged and destroyed. Neither A. nor B. could thenceforth sue upon the lessee's covenants in C.'s lease (*z*); and, on the other hand, neither A. nor B. would be liable to perform the covenants by the lessor, for they also were held to be incident to the original reversion only. To remedy these inconveniences the Act 8 & 9 Vict. c. 106 (s. 9), enacted in effect that when the reversion on a lease (made before or after the Act) should after 1 Oct., 1845, be surrendered or merge, the covenants in the lease should be annexed to and run with the reversionary estate for the time being immediately expectant on the term (*a*).

As to leases made after 1881, the Conveyancing Act, 1881, provides that the rent reserved and the benefit of the lessee's covenants "having reference to the subject-matter" of the lease "shall be annexed and incident to and shall go with the reversionary estate in the land immediately expectant on the term granted by the lease" (*b*).

Burden of lessor's covenants.

As to the burden of covenants by the lessor, the second section of the statute 32 Hen. 8, c. 34, made assignees of the reversion liable to be sued by the lessee or his assigns (*c*). This section, like the first section, is general in its terms; but, as we have observed above, the Courts confined the operation of the statute to covenants touching the subject-matter of the lease. As to leases made after 1881, the Conveyancing Act provides that the obligation of such covenants, entered into by the lessor, shall be annexed and incident to the reversion immediately expectant on the term (*d*).

Implied covenants for title under Conveyancing Act, 1881.

By virtue of the Conveyancing and Law of Property Act, 1881 (*e*), in a conveyance of leasehold property to a purchaser on a sale, there are implied covenants with the assignee by the person who conveys (*f*), and is expressed to convey, "as beneficial owner," for right to convey, for quiet enjoyment, for freedom from incumbrances, and for further assurance, and also for the validity of the lease. These implied covenants are in such terms as to extend only to the acts of the covenantor and of

(*z*) See Wms., R. P. 289; J. W. Smith, L. & T. 366.

(*a*) See observations in Dav. Conc. Prec. p. 18.

(*b*) 44 & 45 Vict. c. 41, s. 10.

(*c*) See J. W. Smith, L. & T. 451.

(*d*) 44 & 45 Vict. c. 41, s. 11.

(*e*) 44 & 45 Vict. c. 41, s. 7, § 1 (A), (B).

(*f*) "Conveyance" includes "assignment," the word ordinarily used in respect of leaseholds. (S. 2 (v.).)

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persons through whom he derives title otherwise than by purchase for value; and for this purpose a marriage settlement is not a purchase for value (*g*).

It will be observed that the Act does not provide for a covenant by the purchaser to indemnify the vendor against the rent and covenants under the lease, and therefore an express covenant for such indemnity should be inserted in an assignment of leaseholds on sale (*h*).

The Act provides that the benefit of the covenants implied as aforesaid shall be annexed and incident to, and shall go with, the estate or interest of the implied covenantee, and shall be capable of being enforced by every person in whom that estate or interest is from time to time vested (*i*).

"This sub-section," say Messrs. Wolstenholme and Turner (*k*), "makes all covenants implied under this section run with the land so as to be enforceable by every person interested under the conveyance. It precludes any difficulty as to what covenants do or do not run with the land. An implied covenant under this section will therefore be more valuable than the ordinary covenant."

Proviso for re-entry (*l*).

It is usual to secure the payment of the rent and the observance and performance of the covenants by inserting in the lease a proviso or condition (*m*) for re-entry by the lessor, on non-payment of the rent or breach of any of the covenants, and for the cesser of the lease upon such re-entry. On the ground that such a condition was entire and indivisible, the law formerly was, that, if the landlord gave a licence to do what otherwise would have been ground for forfeiture (*e.g.*, to assign or underlet where the lease contains a covenant not to assign or underlet), or if, after any breach he actually, *i.e.* by some positive act, as distinguished from mere standing by or acquiescence (*mm*), waived the forfeiture, the

Licence or waiver.

(*g*) 1 K. & E. 425; see *post*, p. 356, as to covenants for title.

(*h*) Dart, V. & P. 629. See form of such a covenant in Dav. Conc. Prec. p. 150; 1 K. & E. 448.

(*i*) 44 & 45 Vict. c. 41, s. 7 (6).

(*k*) Note to s. 7 (6), p. 37.

(*l*) Elph. Introd. 212.

(*m*) "*Provisoes* and *conditions* are words signifying almost exactly the same thing, a condition being denominated a proviso merely on account of the word with which it usually begins; and each of these expressions alike signifies some quality annexed to a real estate, by which it may be defeated, enlarged, or created upon an uncertain event. The only difference between them is that a *proviso* is always in express words, whereas there are certain conditions which the law implies, even though they are not mentioned;" J. W. Smith, L. & T. 137. See Shep. T. 121, 122; Co. Litt. 203*b*.

(*mm*) *Doe* d. *Sheppard* v. *Allen*, 3 Taunt. 78; *Perry* v. *Davis*, 3 C. B. N. S. 769.

Severance of reversion.

proviso for re-entry was destroyed, and the landlord could not take advantage of any subsequent breach (*n*). It was also the law that a grantee of part of the reversion (*o*) could not take advantage of the condition; as if the lease were of three acres, reserving a rent upon condition, and the reversion was granted of two acres, the rent would be apportioned by the act of the parties, but the condition was destroyed, for that it was "entire and against common right" (*p*). But by the Act 22 & 23 Vict. c. 35 (commonly known as Lord St. Leonards' Act), it was enacted as follows:—

Restriction on effect of licence:

S. 1. "Where any licence to do any act which without such licence would create a forfeiture, or give a right to re-enter under a condition or power reserved in any lease heretofore granted or to be hereafter granted, shall at any time after the passing of this Act be given to any lessee or his assigns, every such licence shall, unless otherwise expressed, extend only to the permission actually given, or to any specific breach of any proviso or covenant made or to be made, or to the actual assignment, under-lease, or other matter thereby specifically authorised to be done, but not so as to prevent any proceeding for any subsequent breach (unless otherwise specified in such licence); and all rights under covenants and powers of forfeiture and re-entry in the lease contained shall remain in full force and virtue, and shall be available as against any subsequent breach of covenant or condition, assignment, under-lease, or other matter, not specifically authorised or made dispunishable by such licence, in the same manner as if no such licence had been given; and the condition or right of re-entry shall be and remain in all respects as if such licence had not been given, except in respect of the particular matter authorised to be done.

—of partial licence.

S. 2. "Where in any lease heretofore granted, or to be hereafter granted, there is or shall be a power or condition of re-entry on assigning or under-letting or doing any other specified act without licence, and a licence at any time after the passing of this Act shall be given to one of the several lessees or co-owners to assign or underlet his share or interest, or to do any other act prohibited to be done without licence, or shall be given to any lessee or owner, or any one of several lessees or owners, to assign or underlet part only of the property, or to do any other such act as aforesaid in respect of part only of such property, such licence shall not operate to destroy or extinguish the right of re-entry in case of any breach of the covenant or condition by the co-lessee or co-lessees, or owner or

(*n*) See *Dumpor's Case*, and notes thereto, 1 Sm. L. C., where waiver of the condition itself is distinguished from waiver of a particular breach.

(*o*) *I.e.*, of the reversion in part of the land, as distinguished from a grantee of part of the *estate* in reversion, *e.g.*, where a reversioner in fee simple on a lease for years grants an estate for life to a third person. The latter case was held to be within 32 Hen. VIII. c. 34; see Co. Litt. 215*a*; *Wright* v. *Burroughes*, 8 C. B. 685; Hood & Challis on the Conveyancing Act, 1881, note to s. 10.

(*p*) Co Litt. 215*a*.

owners, of the other shares or interests in the property, or by the lessee or owner of the rest of the property (as the case may be) over or in respect of such shares or interests or remaining property, but such right of re-entry shall remain in full force over or in respect of the shares or interests or property not the subject of such licence.

Apportionment of condition of re-entry on severance of the reversion.

S. 3. "Where the reversion upon a lease is severed, *and the rent or other reservation is legally apportioned* (*q*), the assignee of each part of the reversion shall, in respect of the apportioned rent or other reservation allotted or belonging to him, have and be entitled to the benefit of all conditions or powers of re-entry (*r*) for non-payment of the original rent or other reservation, in like manner as if such conditions or powers had been reserved to him as incident to his part of the reversion in respect of the apportioned rent or other reservation allotted or belonging to him."

As to leases made after 31 Dec., 1881, the Conveyancing and Law of Property Act, 1881 (*s*), provides for the apportionment of all conditions and rights of re-entry where the reversion is severed, or where there is an avoidance or cesser in any manner of the term as to part of the land. This enactment, it will be observed, is not confined to conditions of re-entry for non-payment of rent. Reference has been made above (*t*) to the provisions of the Act making the rent and benefit of the lessee's covenants and the obligation of the lessor's covenants run with the reversion; and these provisions are made to apply in case of the severance of the reversionary estate (*u*).

Waiver.

As regards waiver, it was enacted in 1860, by the Act 23 & 24 Vict. c. 38, that:—

S. 6. "Where any actual waiver of the benefit of any covenant or condition in any lease on the part of any lessor, or his heirs, executors, administrators, or assigns, shall be proved to have taken place after the passing of this Act in any one particular instance, such actual waiver shall not be assumed or deemed to extend to any instance or any breach of covenant or condition other than that to which such waiver shall specially relate, nor to be a general

(*q*) As to apportionment of rent on severance by assignment of the reversion in part of the land, see 3 Cruise, Dig. 303—304; *Bliss* v. *Collins*, 5 B. & Ald. 876; S. C. 1 J. & W. 426; from which it appears that as between assignor and assignee the rent is apportionable at common law, but that the apportionment is not binding on the lessee without his consent or the verdict of a jury. And the rent cannot be apportioned by alienation of the lessee. See *Mayor of Swansea* v. *Thomas*, 10 Q. B. D. 48.

(*r*) Observe the difference between apportionment of the rent, and apportionment of the benefit of a condition: the latter was not possible at common law.

(*s*) 44 & 45 Vict. c. 41, s. 12.

(*t*) *Ante*, pp. 161, 163.

(*u*) Ss. 10, 11.

waiver of the benefit of any such covenant or condition, unless an intention to that effect shall appear."

Implied waiver.

Waiver of the landlord's right to take advantage of the forfeiture may be implied, where he, with knowledge of the forfeiture, has received rent accrued since the breach of the condition (*x*). In reference to such implied waiver, by receipt of rent, it should be observed that it has been held that, where money is paid as rent under a lease, a mere protest that it is not received as rent, and is accepted without prejudice to the right to insist upon a prior forfeiture, cannot countervail the fact of such receipt (*y*).

Breach of covenants to insure, &c.

A condition of re-entry was, as Mr. J. Williams said (*z*):—

"Evidently a very serious instrument of oppression in the hands of the landlord, when the property comprised in the lease was valuable, and the tenant by mere inadvertence might have committed some breach of covenant. To forget to pay the annual premium on the insurance of the premises against fire might thus have occasioned the loss of the whole property; although, on the other hand, the landlord might well have considered such forgetfulness inexcusable, since it might end in the loss of the premises by fire whilst uninsured."

Relief against Forfeiture (*a*).

By the Act 22 & 23 Vict. c. 35 (ss. 4—9), a limited power was given to Courts of Equity to relieve against forfeiture for breach of a covenant or condition to insure against fire; and this power was extended to the superior Courts of Common Law by the Common Law Procedure Act, 1860 (*b*). These enactments have, however, been repealed by the Conveyancing and Law of Property Act, 1881 (*c*); and in lieu thereof, it is enacted, in regard to all leases whether made before or after the commencement of the Act, and notwithstanding any stipulation to the contrary, that (with certain exceptions) a right of re-entry or forfeiture, under any proviso or stipulation in a lease, for a breach of any covenant or condition, shall not be enforceable until after service by the lessor on the lessee of a notice specifying the breach, and, if it is capable of remedy, requiring him to remedy it, and in any case

(*x*) Elph. Introd. 216. See, as to waiver by acceptance of rent, J. W. Smith, L. & T. 142.

(*y*) *Croft* v. *Lumley*, 6 H. L. C. 672; and see *Davenport* v. *The Queen*, 3 App. Cas. 115, a decision of the Judicial Committee of the Privy Council and therefore not binding on the English courts: see *Leask* v. *Scott*, 2 Q. B. D. 376, for an instance in which the Court of Appea declined to follow a decision of the Judicial Committee.

(*z*) R. P. 455.

(*a*) Elph. Introd. 213.

(*b*) 23 & 24 Vict. c. 126, s. 2.

(*c*) 44 & 45 Vict. c. 41, s. 14.

requiring him to make compensation in money for the breach; and until failure by the lessee within reasonable time thereafter to remedy it, if capable of remedy, and to make reasonable compensation in money to the satisfaction of the lessor. And where the lessor is proceeding to enforce such right of re-entry or forfeiture, the lessee may, in the lessor's action, if any, or in any action brought by himself, apply to the Court for relief; and the Court may grant or refuse relief, on such terms as, having regard to all the circumstances, it thinks fit.

Cases excepted from relief.

The exceptions to which these provisions do not apply are, (1) a covenant or condition against the assigning, under-letting, parting with the possession, or disposing of the land leased (*cc*); or a condition for forfeiture on the bankruptcy of the lessee (*d*), or on taking in execution of the lessee's interest; and (2) in case of a mining lease, a covenant or condition for allowing the lessor to have access to or inspect books, accounts, records, weighing machines, or other things, or to enter or inspect the mine or the workings thereof (*e*).

And the above provisions of the Act are not to affect the law relating to re-entry, or forfeiture, or relief, in case of non-payment of rent (*f*).

Re-entry for non-payment of rent—"legal demand."

Formerly re-entry for non-payment of rent had in all cases to be preceded by a legal demand of the rent; *i.e.*, a demand made in a formal manner. The law required that the demand should be made upon the land itself; that it should specify the precise amount due, and should be made at a convenient time, before sunset of the last day on which it should be paid according to the condition of re-entry (*g*). But, under the Common Law Procedure Act, 1852 (*h*), where one half year's rent is in arrear, and the lessor has a right to re-enter for non-payment thereof, he may, "without any formal demand or re-entry," serve a writ in ejectment (*i*) for the recovery of the demised premises, which service

(*cc*) *Barrow* v. *Isaacs* (1891), 1 Q. B. 417.

(*d*) *Ex parte Gould*, 18 Q. B. D. 454.

(*e*) 44 & 45 Vict. c. 41, s. 14 (6), (i.), and (ii.).

(*f*) *Ib.*, sub-s. 8. As to relief in such cases, see the note to this clause in Messrs. Hood & Challis's edition of the Act.

(*g*) See *Duppa* v. *Mayo*, 1 Wms. Saund. at 287; *Phillips* v. *Ridge*, L. R. 9 C. P. 49, note; J. W. Smith, L. & T. 164.

(*h*) 15 & 16 Vict. c. 76, s. 210 (replacing the similar provisions of 4 Geo. II. c. 28). Actions to recover possession of land may be brought in a county court, where neither the value of the lands nor the rent exceeds 50*l.* per annum; County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 59; *ib.* s. 138 (as to recovery of small tenements).

(*i*) Now an action to recover possession of land. See R. S. C. Ord. 47.

is to stand in place of a demand and re-entry; and upon proof at the trial that the half year's rent was due, that no sufficient distress could be found on the premises, and that the lessor had a right to re-enter, the lessor recovers judgment and execution, *i.e.*, is put into possession (*k*), and holds the demised premises discharged from the lease, unless the lessee pays the rent and arrears and full costs, and proceeds for relief in equity within six months. The lessee may within six months after the lessor has obtained judgment and execution, obtain relief against the forfeiture in a Court of Equity, upon the terms of paying into Court such sum as the lessor swears to be due and costs (*l*). It is also provided (*m*) that if the tenant, at any time before the trial in ejectment, pays or tenders the rent and costs, all further proceedings in the ejectment shall cease; and by the Common Law Procedure Act, 1860 (*n*), it is enacted that the same relief, upon the same terms as to payment of rent, costs and otherwise, may be given by the superior courts of Common Law, upon rule or summons, in a summary manner. It will be observed that the statutes apply only where a half-year's rent is due, and the lease contains a power of re-entry on non-payment of rent. In every well-drawn lease, therefore, a right of entry is given for non-payment of rent, "whether the rent shall have been legally demanded or not."

Actual entry on the land is not necessary in order to determine the tenancy. It is sufficient that some act be done by the landlord, showing his intention to determine it (*o*). As Lord Mansfield said ( ) :—

"The reason of the thing is agreeable to the practice" (namely, that entry is unnecessary); "for it is absurd to entangle men's rights in nets of form without meaning; and an ejectment, being a mere creature of the Court, passed for the purpose of bringing the right to an examination, an actual entry can be of no service."

Forcible entry

Where an actual re-entry is made, it must be in a peaceable manner, for "it is part of the law that no one shall, with force

(*k*) See R. S. C. Ord. 42, r. 5; and writ of possession, R. S. C. App. H. No. 8.

(*l*) 15 & 16 Vict. c. 76, s. 211.

(*m*) *Ib.*, s. 212.

(*n*) 23 & 24 Vict. c. 126, s. 1; *Croft* v. *London & County Banking Co.*, 14 Q. B. D. 347.

(*o*) *Doe* d. *Phillips* v. *Rollings*, 4 C. B. 196 *et seq.*

(*p*) In *Goodright* d. *Hare* v. *Cator* (quoted in *Doe* v. *Rollings*, 4 C. B. at p. 198), where the question was whether an actual entry was necessary to maintain an ejectment on a clause of re-entry for non-payment of rent: and see *Baylis* v. *Le Gros*, 4 C. B. (N. S.) 537.

and violence, assert his own title" (q); and forcible entry was made illegal by 5 Richard II., stat. i., c. 8, which provided that, even where there is a legal right of entry, no man shall enter with strong hand, nor with multitude of people, but only in a peaceable and easy manner. If he cannot do so, he must resort to the Courts (r).

Increase of rent.

Before passing from the subject of rent and covenants, it should be observed, that although the lessor can reduce the amount of rent, he cannot increase it during the lease. Thus, supposing a breach of covenant by assignment without licence, and the lessor willing to waive the right of re-entry on condition of an increased rent, to which both parties agree: this can only be carried out by surrender of the existing lease, and grant of a new one at the increased rent. A landlord, who had demised premises for a term of fifty years at £50 a year, agreed with his tenant to lay out £50 in making improvements on them, the tenant undertaking to pay an increased rent of £5 per annum during the remainder of the term (s). It was held that the landlord, having spent the money, could recover arrears of £5 per annum as upon a personal contract; but, said Littledale, J.:—

"It is not rent in the legal sense and understanding of the word rent. It could not be distrained for, for there is no lease which embraces it; the lease is for £50 a year, and there is no lease at £55. If there be a power of re-entry for non-payment of the rent, as is probably the case, there could be no ground for enforcing it in respect of the additional £5. The assignee of the term could not be charged with the increased rent; the assignee of the reversion could not claim it, because it is not annexed to the reversion. If the lessor should die, the rent of £50 would go to his heir or devisee, but the right to this additional £5, being a mere matter of personal contract, would go to his executor. The only way in which it could be taken to be rent would be that this contract creates a new demise at an increased rent, and that, therefore, by operation of law, the old lease is surrendered by such new demise: but it could never be supposed to be in the contemplation either of the landlord or the tenant that the old lease should be at an end, and that instead of it a new lease should be created, which, being only by parol, could only have the effect of a lease at will" (t).

(q) *Per* Lord Kenyon, C.J., *R.* v. *Wilson*, 8 T. R. at p. 361.

(r) *Edwick* v. *Hawkes*, 18 Ch. D. 199. See further, as to forcible entry, Co. Litt. 257*b*; Com. Dig. s.v. *Forceable Entry*; *Beddall* v. *Maitland*, 17 Ch. D. 174; J. W. Smith, L. & T. 384; Pollock on Torts, pp. 327 *et seq.*; *Jones* v. *Foley*, W. N. 1891, p. 78.

(s) *Donellan* v. *Read*, 3 B. & Ad. 899.

(t) But as to reservation of additional rent in a lease on breach of covenant, see *Weston* v. *Managers of Metropolitan Asylum District*, 8 Q. B. D. 387; affirmed on appeal, 9 Q. B. D. 404.

Liability of executor or administrator.

It will be remembered that the lessee's covenant is to pay rent during the whole term. The personal representative of an original lessee is therefore liable, if sued in his representative capacity, for the rent, but only to the extent of the assets; and he may be also sued personally, as being an assignee of the lease by operation of law (*u*).

The liability of an executor or administrator, in his representative capacity, in respect of the covenants and agreements contained in a lease, is now limited by the Act 22 & 23 Vict. c. 35, so as to enable him to assign the lease to a purchaser, and distribute the assets of his testator or intestate.

The provision is as follows:—

22 & 23 Vict c. 35.

S. 27. "Where an executor or administrator, *liable as such* to the rents, covenants, or agreements, contained in any lease or agreement for a lease, granted or assigned to the testator or intestate whose estate is being administered, shall have satisfied all such liabilities under the said lease or agreement for a lease as may have accrued due and been claimed up to the time of the assignment hereafter mentioned, and shall have set apart a sufficient fund to answer any future claim that may be made in respect of any fixed and ascertained sum covenanted or agreed by the lessee to be laid out on the property demised, or agreed to be demised, although the period for laying out the same may not have arrived, and shall have assigned the lease or agreement for a lease to a purchaser thereof, he shall be at liberty to distribute the residuary personal estate of the deceased to and amongst the parties entitled thereto respectively, without appropriating any part, or any further part (as the case may be), of the personal estate of the deceased to meet any future liability under the said lease or agreement for a lease; and the executor or administrator so distributing the residuary estate shall not, after having assigned the said lease or agreement for a lease, and having, where necessary, set apart such sufficient fund as aforesaid, be personally liable in respect of any subsequent claim under the said lease or agreement for a lease; but nothing herein contained shall prejudice the right of the lessor or those claiming under him to follow the assets of the deceased into the hands of the person or persons to or amongst whom the said assets may have been distributed."

Evidence on sale of lease of performance of covenants.

In the case of a sale of land held on lease, it is now provided by the Conveyancing and Law of Property Act, 1881 (*x*), that

(*u*) As to the liability of an executor or administrator, see J. W. Smith, L. & T. 477 *et seq.*; 1 Wms. Saund. 240 (p. 301, ed. 1871); and *Re Bowes, Strathmore* v. *Vane*, 37 Ch. D. 128, from which it appears that, if sued as assignee of the lease, he may protect himself from liability beyond the actual profits or yearly value of the premises; *i.e.*, the amount of rent which he might have got by using reasonable diligence.

(*x*) 44 & 45 Vict. c. 41, s. 3 (4). This

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on production of the receipt for the last payment due for rent before the date of actual completion of the purchase, the purchaser shall assume, unless the contrary appears, that all the covenants and provisions of the lease have been duly performed and observed up to such date.

Underlease

Unless restrained by express covenant (and such restrictive covenant is not a "usual" covenant) (*y*), the tenant for a term may, without leave from the lessor, make an underlease for any part less than the whole (*z*) of his term; and the underlessee becomes his tenant—not tenant to the lessor, for there is no privity between them.

Evidence on sale of underlease of performance of covenants.

In the case of a sale of land held by underlease, a provision (corresponding to that above referred to in the case of a sale of land held on lease), is made by the Conveyancing and Law of Property Act, 1881 (*a*), that on production of the receipt for the last payment due for rent under the underlease, before the date of actual completion of the purchase, the purchaser shall assume, unless the contrary appears, that all the covenants and provisions of the underlease have been duly performed and observed up to such date; and further, that all rent due under every superior lease, and all the covenants and provisions of every superior lease, have been paid and duly performed and observed up to that date.

Terms of years.

Mortgage.

Under the English system of conveyancing, the creation of long terms of years—say, 100, 500, or 1000—has been resorted to as the machinery for creating pecuniary charges on land.

To secure portions.

Thus, where by a strict settlement, a life estate is limited to the father, with remainder in tail to his eldest and other sons, but it is nevertheless desired to make provision, by providing "portions," as they are called, for younger children, it is usual to limit an estate to trustees for a long term of years—say, 500 years, for the purpose of raising the portions (*b*). The result is, that the lands become charged in favour of the trustees with the portions

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does not apply to a peppercorn rent, *In re Moody and Yates' Contract*, 28 Ch. D. 661.

(*y*) Dart, V. & P. 192, referring to *Buckland* v. *Papillon*, L. R. 2 Ch. Ap. 67, and *Hampshire* v. *Wickens*, 7 Ch. D. 555.

(*z*) An underlease for the whole of the term amounts to an assignment: *Beardman* v. *Wilson*, L. R. 4 C. P. 57; and see the earlier cases reviewed in Platt on Leases, vol. i. *ad init.* A rent may be reserved though there is no reversion; *Williams* v. *Hayward*, 1 E. & E. 1040.

(*a*) 44 & 45 Vict. c. 41, s. 3 (5).

(*b*) This term is limited so as to commence from the death of the tenant for life but to precede the estates tail.

in question, which can at any time be raised by the trustees by a mortgage of the term (*c*), and the persons succeeding to the estate take it with this burthen upon it (*d*).

Proviso for cesser and assignment of satisfied terms.

Formerly, when the purposes for which the term had been created were fulfilled, or had come to an end, the term itself was sometimes made to cease by means of an express "proviso for cesser," as it is called, in the deed creating the term (*e*); but sometimes it was kept alive, and, in case of (*e.g.*) the purchase of the fee simple, it was assigned to a trustee for the purchaser in trust to attend the inheritance, the effect of which was to protect him against any incumbrance (*e.g.*, rent-charge), created subsequently to the term, and of which on purchasing he had no notice (*f*).

But now, by reason of an Act commonly known as the Satisfied Terms Act (*g*), when the purpose of the term is fulfilled or at an end, it generally ceases, *ipso facto*, to exist, and cannot be assigned in trust for a purchaser (*h*). It may, however, be released by the beneficiaries, or surrendered by the termor; or, where there is any doubt as to the person in whom the immediate reversion expectant on the term is vested, assigned to a trustee that it may cease (*i*).

As to dealing with the term by way of release, Mr. Davidson says (*j*):—

"This method of dealing with and getting rid of a term is very commonly and efficaciously adopted where all the parties beneficially interested in the monies secured by the term are able and willing to join in the conveyance; and it may save considerable expense by avoiding the necessity of tracing the representation to the term, and procuring the concurrence of the trustees. The purchaser must, however, satisfy

(*c*) See form in Dav. Conc. Prec. lx. p. 241.

(*d*) See the analysis of a strict settlement in Elph. Introd. 326; and see form of trusts of a term to raise portions in 2 K. & E. 671.

(*e*) See form of proviso for cesser in Dav. Conc. Prec. p. 243. Its operation depends on the doctrine that, though a freehold estate could not at common law (*i.e.*, apart from the Statute of Uses) be made to cease by a mere direction of the parties, yet an estate for years could be made to determine *ipso facto* on the performance of a particular act: 1 Cruise, Dig. 227.

(*f*) See Wms., R. P. 475 *et seq.*; Dart, V. & P. 576. As to the former law with respect to attendant terms, see 1 Cruise, Dig. 418 *et seq.*

(*g*) 8 & 9 Vict. c. 112; see the observations on this Act in Dav. Conc. Prec. pp. 20 *et seq.*

(*h*) The Act does not apply to copyholds, or customary lands, or leaseholds by sub-demise: see 2 Da. i. 306, note and 672, note.

(*i*) See form of surrender, 2 Dav. Conv. i. 304; of release and of assignment in trust, *ib.* 310, 311.

(*j*) Dav. Conv. vol. ii. pt. i. p. 310, note.

himself that the trustees, whose concurrence he thus dispenses with, have no costs secured to them by the term unpaid, lest the term should not be really satisfied; and, as a general rule, it will not be safe to rely on this method of extinguishing a term if there have been any dealings with the term in which costs may have been incurred."

The Act itself deals first, with satisfied terms of years, which, either by express declaration or by construction of law, were on 31st December, 1845, attendant upon the inheritance or reversion of any lands; secondly, with terms subsisting at the date of the passing of the Act, or thereafter to be created, becoming satisfied *after* the 31st December, 1845, and which, either by express declaration or by construction of law, should after that day become attendant upon the inheritance or reversion. As to the first, it provided that every such term should absolutely cease and determine; except that every such term attendant by express declaration should, notwithstanding, afford to every person the same protection as it would have afforded if it had continued to subsist, and for such purpose should be considered in law and equity a subsisting term. As to the second, it provided that every such term, upon becoming so attendant, should immediately cease.

The meaning of a term being "satisfied" within the Act of Parliament was much discussed in a case in 1872 (*k*), from which it seems that a term is not satisfied within the meaning of the Act so long as there remains any useful purpose beneficial to the owner of the term, and consistent with the trust on which, at the date of the transaction, the term was held (*l*); in other words, the term does not become satisfied within the meaning of the Act, except when the beneficial interest in the whole charge secured by the term, and the beneficial interest in the whole estate, are united and merged in one person (*m*). The facts in the case were:—A. being lessee of land for 99 years, created a mortgage term, which ultimately became vested in a trustee for the mortgagee, and A. subsequently acquired the fee. He afterwards became bankrupt. In pursuance of an agreement between the assignees in bankruptcy of his estate, himself, and the mortgagee,

(*k*) *Anderson* v. *Pignet*, L. R. 8 Ch. 180; and see Dav. Conc. Prec. pp. 22 *et seq.*, where it is said that the expression "satisfied term" is generally understood to mean a term, the trusts, purposes, or objects of which have been performed or fulfilled, or have become incapable of taking effect.

(*l*) *Per* Lord Selborne, L.C.

(*m*) *Per* James, L.J.

a deed was executed by which the mortgagee released the mortgage debt, and the fee simple was conveyed to the mortgagee freed and discharged from all equity of redemption. It was intended that the wife of A. (who was married in 1832) should join in the deed for the purpose of releasing her dower; but she refused to execute it, and after the death of A. she filed her bill to enforce her right to dower. It was held that the term was not satisfied, but afforded the purchaser protection against the plaintiff's right to dower. It was added by Lord Selborne, L. C. :—

"I think it right to say, that when I find an express declaration in a deed that a term not previously satisfied shall, upon becoming satisfied, become attendant upon the inheritance conveyed to a particular purchaser, to be assigned and disposed of and held for his benefit, I do not think the effect of the statute, according to the true construction, is to defeat that trust or to make the term cease for the benefit of somebody else who has not any part or share or interest in the inheritance which is conveyed by that particular deed."

Enlargement of residue of long term into fee simple.

A long term of years not unfrequently exists which is in value nearly equivalent to the fee simple, and at the expiration of which evidence of title to the reversion will almost certainly, from the lapse of time, have disappeared. "The usual origin of a long term," say Messrs. Wolstenholme and Turner, "is a mortgage by demise (*n*) where the right of redemption has been fore-

(*n*) Under Lord Cranworth's Act (23 & 24 Vict. c. 145, s. 15), it was provided that the person exercising the power of sale by that Act conferred on mortgagees should have power by deed to convey or assign to and vest in the purchaser the property sold, *for all the estate and interest therein which the person who created the charge had power to dispose of*, except that in the case of copyhold hereditaments the beneficial interest only should be conveyed to and vested in the purchaser by such deed. (See as to this exception *Re Solomon & Meagher*, 40 Ch. D. at p. 510.) In *Hiatt* v. *Hillman*, 19 W. R. 694, it was held that the effect of this section was to enable mortgagees, to whom leaseholds had been mortgaged by demise, to assign to a purchaser, on a sale under the statutory power, the whole of the original term, and not only the term demised; and in *Re Solomon & Meagher* (*ubi sup.*), to enable an equitable mortgagee to convey the legal estate; and it would seem that the enactment would enable a mortgagee by demise of freeholds to convey the freehold interest, and the personal representative of a mortgagee in fee to convey the legal estate to a purchaser (2 Da. ii. 88). The above provision is, however, repealed by s. 71 of the conveyancing Act, 1881 (44 & 45 Vict. c. 41), and under s. 21 of the same Act, it is provided, as under the ordinary power of sale in a mortgage deed, that "a mortgagee exercising the power of sale conferred by this Act shall have power, by deed, to convey the property sold, *for such estate and interest therein as is the subject of the mortgage*, freed from all estates, interests, and rights to which the mortgage has priority, but subject to all estates, interests, and rights,

closed, or has been barred by possession and lapse of time. The fact that the land is not freehold is often overlooked, complication of title arises, and the intentions of a testator are sometimes frustrated, the leasehold interest passing under a gift not intended to include it" (*o*).

Now, by the Conveyancing and Law of Property Act, 1881 (*p*), it is enacted that any of the persons therein specified may, subject to the restrictions therein specified, by deed enlarge the term into a fee simple where there is a residue unexpired of not less than 200 years, such term, as originally created, having been for not less than 300 years; provided that it is without any trust or right of redemption, affecting the term, in favour of the freeholder or other person entitled in reversion expectant on the term; and that there is no rent having a money value incident to the reversion (*q*). And it is provided (*r*) that the estate in fee simple acquired by enlargement shall be subject to all the same trusts, powers, executory limitations over, rights, and equities, and to all the same covenants and provisions relating to user and enjoyment, and to all the same obligations of every kind, as the term would have been subject to if it had not been enlarged.

A doubt having arisen whether this enactment did not apply only to a term upon which the immediate reversion is an estate in fee simple, it has been further enacted by way of amendment, by the Conveyancing Act, 1882 (*s*), that the above enactment shall apply, and be deemed to have always applied, whether the term has, as the immediate reversion thereon, the freehold or not; but not where the term is liable to be determined by re-entry for condition broken, or has been created by sub-demise out of a

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which have priority to the mortgage." This section, applying to mortgages made after 1881, does not enable a mortgagee to convey a larger estate than he has; *e.g.*, an equitable mortgagee cannot convey the legal estate: *Re Hodson & Howes*, 35 Ch. D. 668. The section also makes the exception that "in the case of copyhold or customary land, the legal right to admittance shall not pass by a deed under this section, unless the deed is sufficient otherwise by law, or is sufficient by custom in that behalf."

(*o*) Wol. & T. p. 113; see also Dart, V. & P. 335, 336.

(*p*) 44 & 45 Vict. c. 41, s. 65.

(*q*) For forms of such deeds, see Dav. Conc. Prec. pp. 569 *et seq.*; and see observations on this section, *ibid.* pp. 80, 81. It has been held that a rent of 3*s.* is not a rent having no money value within the section; *Re Smith & Stott*, 29 Ch. D. 1009, n.; but that a rent of "one silver penny, if lawfully demanded," is such a rent; *Re Chapman & Hobbs*, 29 Ch. D. 1007.

(*r*) S. 65 (4).

(*s*) 45 & 46 Vict. c. 39, s. 11.

superior term, which itself is incapable of being enlarged into a fee simple.

IV. Estate at sufferance.

It remains to explain the nature of an Estate at Sufferance. It arises when one having come into possession of land under a lawful title wrongfully continues in possession or "holds over," as it is called, after his title has determined. Thus, a tenant under a lease for years, holding over without leave after the expiration of the term of years, would be a tenant at sufferance; or, in case of a tenancy from year to year, and notice to quit at the end of the year duly given, if the tenant hold over, he will be in at sufferance (*t*).

Remedies for holding over.

The possession, however, having been originally rightful, the landlord, in order to maintain an action of trespass, must, said Blackstone, first declare the wrongfulness of the possession by some public and avowed act, as by entry or legal process of ejectment, which might then be followed up by an action of trespass (*u*). Statutes, however, have from time to time been passed for the relief of landlords, some by making the tenant liable to pay double the rent, or double the yearly value of the land, as the consequence of his holding over: others in the way of summary remedy before a magistrate, and so forth. Thus by 4 Geo. II. c. 28, it is enacted that a tenant holding over after demand of possession by the landlord shall pay "double the yearly value" of the lands; and by 11 Geo. II. c. 19 (s. 18), that a tenant holding over, after the expiration of a notice given by himself of his intention to quit, shall thenceforth pay "double the rent" which he would otherwise have paid (*x*).

(*t*) See other instances given in Tudor's L. C. R. P. p. 8. It is sometimes called an estate "by" sufferance. From the nature of the estate, it cannot arise by contract. It seems to have originated in a desire to prevent a title from being acquired under the Statute of Limitations by adverse possession, as to which, see *post*, ch. xvi.

(*u*) 2 Bl. Comm. 150; Co. Litt. 57*b*.

(*x*) See Tud. L. C. R. P. p. 11; and, as to the jurisdiction of county courts in cases where neither the value of the premises nor the rent exceeds £50, see the County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 138. See further as to estates at sufferance, 1 Cruise, Dig. 249.

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CHAPTER VII.

ESTATES ON CONDITION: MORTGAGES.

I Estates on Condition.

REFERENCE was made in a former chapter (*a*) to an early doctrine of the law which, in the case of a limitation to one and the heirs of his body, treated the estate as a fee simple, conditional only on issue being born; also (*b*) to cases in which a forfeiture was incurred by non-compliance with the implied condition on which an estate was held, as where a tenant for life or years did some act which amounted to an assertion of a right to a greater estate than that which belonged to him.

In the main, however, the estates already considered have been of an absolute character. It remains to point out a modification of ownership which exists in the case in which an estate is held upon condition. Every one of the different estates which have been under consideration (estates for life, estates in tail or in fee, estates of freehold or not of freehold), may become the subject of, and have superadded to them, this modification.

"Condition" —defined.

A condition has been defined to be "a qualification or restriction annexed to a conveyance of lands, whereby it is provided that, in case a particular event does or does not happen, or in case the grantor or grantee does, or omits to do, a particular act, an estate shall commence, be enlarged, or defeated (*c*)."

A condition may be either implied or express.

Condition implied.

An implied condition is one which is created by common or statute law, without any express words; it is sometimes called "a condition in law" (*d*). Thus, in the case of the grant of an office, which may sometimes amount to a freehold interest, and may be limited to one even in perpetuity, there is implied in law the condition that the grantee shall duly execute the office, and that on breach of this condition, it shall cease (*d*).

(*a*) *Ante*, p. 60.
(*b*) *Ante*, p. 37.
(*c*) 2 Cruise, Dig. 2; Co. Litt. 201*a*.
(*d*) See Litt. s. 325; Co. Litt. 201*a*, and Butler's note (1); Shep. T. 118, 126. A man may have an estate in an office to him and his heirs, or for life, or for a term of years, or during pleasure only,

Says Littleton (*e*):—

"If a man grant by his deed to another the office of parkership of a park, to have and occupy the same office for term of his life, the estate which he hath in the office is upon condition in law, to wit, that the parker shall well and lawfully keep the park, and shall do that which to such office belongeth to do, or otherwise it shall be lawful to the grantor and his heirs to oust him, and to grant it to another if he will."

Another example of an implied condition is afforded by a lease to husband and wife during coverture, in which case they have an estate for term of their two lives, upon condition in law, that if one of them die, or that there be a divorce between them, it shall be lawful for the lessor and his heirs to enter (*f*).

So a tenant for life, or tenant for years, was held to take the estate upon an implied condition that he would not set up a pretence to an interest larger than his actual interest in the lands,—the former that he would not attempt to alienate in fee or in tail, the latter that he would not do an act in assertion of a right to the freehold. It was because the doing of such acts would be in breach of the implied condition under which the estate was held, that the obnoxious act involved a forfeiture of the estate itself (*g*).

Condition expressed.

An express condition is one in terms declared in the instrument creating the estate, or in a separate deed called a "defeasance (*h*)," and is technically termed a condition "in deed" (*i*). A condition of this nature may be "precedent" or "subsequent" (*ii*).

Conditions:— Precedent, Subsequent.

As their names respectively denote, a "condition precedent" is one which must happen before the estate can commence; a condition "subsequent" is one by the happening of which an existing estate may be defeated (*j*). Thus there is a

durante bene placito, as were the judges of the Superior Courts at Westminster until 12 & 13 Wm. III. c. 2, which altered it to *quamdiu bene se gesserint*, which is for life; 3 Cruise, Dig. 99, but their commissions expired with the demise of the Crown till 1 Geo. III. c. 23. The lord of a manor may grant the office of steward of the manor for the life of the grantee; *Bartlett* v. *Downes*, 3 B. & C. 616.

(*e*) S. 378.

(*f*) Co. Litt. 234*b*.

(*g*) 2 Bl. 153; Co. Litt. 233*b*.

(*h*) As to when a defeasance must be contemporaneous with, and when it may be subsequent to, the deed creating the estate, see Shep. T. 396. As to what is a defeasance, see *Ex parte Popplewell*, 21 Ch. D. at p. 81.

(*i*) Co. Litt. 201*a*.

(*ii*) Elph. Introd. 404.

(*j*) 2 Cruise, Dig. 2. But see the remarks of Mr. Preston on Shep. T. 117, where he maintains that "that clause only is a condition which is to defeat the estate after it has been created or enlarged;" in other words, that all conditions, properly so called, are *subsequent*. He says that "when a clause stays or suspends the estate, or rather the gift, and makes it uncertain whether

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condition "precedent" when an estate is granted to one for life, upon condition that if the grantee pay to the grantor a certain sum of money at such a day, then he shall have the fee simple; in this case the condition precedes the estate in fee, and on performance thereof the grantee gains the fee simple. An example of a condition "subsequent" is when a man grants to another an estate in fee, but upon condition that if the grantor shall pay to him at such a day a certain sum, his estate shall cease: here the condition is subsequent and following the estate, and upon the performance thereof determines the same; so that a condition precedent gets and gains the thing or estate made upon condition, by the performance of it; and such a condition subsequent as above cited determines the estate by the performance of the condition (*k*).

Conditions subsequent.

Conditions subsequent must be distinguished from determinable estates, and from conditional limitations. A condition subsequent is something superadded to the limitation of the estate—for example, where an estate is limited to A. and his heirs, with a proviso that if he marry a particular woman the estate shall cease. A condition can only be taken advantage of by the grantor or his heirs (*l*).

Determinable estate.

In the determinable estate, the condition is incorporated into and forms part of the limitation—for example, a gift to A. and his heirs, "tenants of the Manor of Dale," constitutes the tenancy a condition of the existence of the estate; the moment the tenancy of the manor ceases, that moment does the estate determine, and this not by way of engrafted condition, but as part of the terms of grant: the estate as originally created is, in truth, a base (or qualified) fee, for it must be determined whenever the qualification is at an end (*m*). Another instance is

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the gift shall take effect or not, that clause is properly a limitation, and denominated sometimes a conditional limitation, and sometimes a limitation on a contingency." The learned writer, however, appears to mean only that, as (in his own words) "it is the province of a limitation to mark the period or event for the commencement, and the time of continuance or duration of an estate," where an event on which an estate is to arise is specified, *i.e.*, where there is a condition *precedent*, that condition is part of the limitation, inasmuch as it marks the point from which the estate commences.

(*k*) *Termes de la Ley*, quoted by Wharton. See Shep. T. 117.

(*l*) Challis, R. P. 62, 168; Co. Litt. 214*b*; Shep. T. 120, 121.

(*m*) 2 Bl. 154; Co. Litt. 27*a*; Challis, R. P. 202. As to determinable fees, see 3 L. Q. R. 399.

a gift in trust for a man for life, until outlawry, or bankruptcy, or alienation of the property (*n*).

"Conditional Limitation."

A determinable estate is sometimes called a "conditional limitation," but as this phrase is also used in a different meaning, which we proceed to explain, the use of "conditional limitation" in this meaning may lead to confusion.

Mr. Preston says (*o*):—

"An absolute limitation names a day, a time, or an event, for the commencement of the estate, which will certainly happen.

"A conditional limitation, or, as it is otherwise denominated, a limitation upon condition, renders it necessary that some act should be done, or that some event, which will not certainly happen, should take place before a right to present or future enjoyment can arise.

"Contingent remainders, and estates which have their operation by resulting or springing use, or by executory devise, and which are to commence on *an event*, are all raised by conditional limitations. In short, every limitation which is to vest an interest on condition, or rather a contingency (for that is the correct phrase), in other words, an event which may or may not happen, is a conditional limitation. And whether a limitation of this sort is to give an interest to commence on and immediately after the regular and proper determination of a preceding estate, so as to fall within the description of a remainder; or independently of and in derogation, and to the exclusion of a preceding estate, it is properly denominated a conditional limitation, or a limitation on a contingency.

"In practice, those limitations which are to give an estate, to take effect in abridgment and exclusion of another estate (*p*), are more generally distinguished by this term, and those limitations which give contingent remainders, are distinguished by the appellation of limitations upon contingency."

Limitations and conditions distinguished.

The distinction between a condition and a limitation has been thus expressed:—

"A limitation marks the utmost time of continuance; a condition marks some event, which, if it happens in the course of that time, is to defeat the estate. Thus, A. gives land to B. for twenty years. In this case the estate may endure to the end of that period, so that it may be fully completed. The space of twenty years is the period for which the estate is to continue; and the words, appointing this to be the time of continuance, are called the limitation, from their ascertaining the boundary of the estate. But if a clause introduced by, and concluding in words of condition, is added, that if somewhat shall be done, or omitted by either of the parties, or by any other person in the meantime, that

(*n*) See form, 4 Da. 166, and *ante*, p. 108, as to such limitations.

(*o*) Preston on Estates, p. 40.

(*p*) In this case one estate is made to determine, and the other to arise on the performance of the same express condition; the condition is subsequent to the former and precedent to the latter estate.

then the term of twenty years shall cease and be void, this is a clause of condition; and on the rise of the event on which the term is to cease, or be avoided, and a pursuit of title by entry or claim, the condition will put an end to the estate of the person to whom the limitation is made, and of all persons claiming under him, though the period to which it was extended in its limitation, is not yet arrived" (*q*).

In conveyances operating at common law, a subsequent estate limited on a condition which is to defeat a preceding estate is void; but it is otherwise as to conveyances by way of use (*r*): and as to wills, Mr. Fearne says:—

"It seems now agreed, that wherever in a devise a condition is annexed to a preceding estate, and upon the breach or non-performance the estate is devised over to another, that condition shall operate as a limitation, circumscribing the continuance and measure of the first estate: and that upon the breach or non-performance of it (as the case may be), the first estate shall *ipso facto* determine and expire, without entry or claim; and the limitation over shall thereupon actually commence in possession, and the person claiming under it, whether heir or stranger, shall have immediate right to the estate. Thus, indeed, is the testator's intention effectuated, by substantiating the subsequent estate, though limited to a stranger; and enforcing the performance of the condition, by the determination of the preceding estate upon the breach of it; notwithstanding that preceding estate be limited to the heir himself. And limitations of this sort are properly called conditional limitations" (*s*).

The distinction between conditions and limitations is perhaps somewhat refined, but it has certain practical results. Thus, in the case of a condition, where the estate subject to it amounts to a freehold, the law leaves it to the party entitled to the benefit of the condition to take some active step towards its enforcement, and consequently requires him to make an entry on the lands before it treats the estate as determined (*t*). An actual entry is not now necessary; bringing an action of ejectment (now an action to recover possession) would serve the same purpose. For, as Wilde, C.J., said (*u*):—

"It has become common learning that an actual entry is only now

(*q*) Prest. Est. 46. See Challis, R. P. 206, where it is pointed out that where a fee simple is determinable by the form of the limitation (*e.g.*, to A. and his heirs until B. returns from Rome), the estate determines *ipso facto* by the happening of the event: but where there is a condition, external to the limitation, the estate is not determined until entry by the person entitled to take advantage of the condition. See 2 Cruise, Dig. 37, s. 64.

(*r*) Fearne, C. R. 274.

(*s*) Fearne, C. R. 272, 381 (note).

(*t*) Litt. S. 351; Shep. T. 121; *ib.* 150; 2 Cruise, Dig. 37 (s. 64).

(*u*) In *Doe* v. *Rollings*, 4 C. B. 196.

necessary in one case, and that is, to avoid a fine with proclamations; and the only ground upon which it is held to be necessary in that case is the supposed stringency of the express words of the Statute of Fines, 4 Hen. VII. c. 24" (*v*).

Accordingly Blackstone says (*w*) :—

"When an estate is, strictly speaking, upon condition in deed (as if granted expressly upon condition to be void upon the payment of £40 by the grantor, or so that the grantee continues unmarried, or provided he goes to York, &c.), the law permits it to endure beyond the time when such contingency happens, unless the grantor or his heirs or assigns take advantage of the breach of the condition, and make either an entry or a claim, in order to avoid the estate."

It is, otherwise, however, when the estate is not one of freehold. Thus, if a lease for years be made on condition that, if the lessee goes not to Rome before such a day, the lease shall be void, the lease is *ipso facto* void upon the breach of the condition without any entry by the lessor, but if the lease had been for life, an entry would have been necessary before it could have been defeated (*x*).

In the case of the determinable estate, the estate terminates *ipso facto* by the happening of the specified event. Thus Blackstone says (*y*) :—

"When land is granted to a man, so long as he is parson of Dale, or while he continues unmarried, or until out of the rents and profits he shall have made £500 and the like, the estate determines as soon as the contingency happens (when he ceases to be a parson, marries a wife, or has received the £500), and the next subsequent estate, which depends upon such determination, becomes immediately vested, without any act to be done by him who is next in expectancy."

Stranger taking benefit of condition.

So again at common law it was not open to a stranger to take advantage of an express condition subsequent, or to enter for its breach. The benefit of the condition was reserved to the grantor or his heirs; and the right of entry could not be assigned. Thus, to take the common case of a lease, with a proviso for avoidance and re-entry on non-payment of rent; there, if the grantor assigned over his estate to another, that other could not avail himself of the condition. On the other hand, in the case

(*v*) This was said in 1847. Fines were abolished by 3 & 4 Wm. IV. c. 74.

(*w*) Vol. ii. 155.

(*x*) "For a lease for years may begin without ceremony, and so end without ceremony;" Co. Litt. 214*b*; see Shep. T. 151; 2 Cruise, Dig. 32 (s. 39); *ib.* 33 (s. 45).

(*y*) Vol. ii. 155.

of the determinable estate, the estate itself ceasing to exist, any person entitled to enter upon its termination, whether stranger or not, might do so. Thus, if a man make a lease until A. shall return from Rome, and afterwards grant the reversion over to another, such grantee, on the return of A. from Rome, is entitled to enter, the interest of the lessee being then determined by the terms of the limitation itself (*z*).

The incapacity, however, of strangers to take the benefit of these conditions was a doctrine only of the common law; and, as regards the grantees of reversions upon leases for life or years, was, as we have seen, remedied by statute so far back as the reign of Henry VIII. (*a*).

Now, under the Act to Amend the Law of Real Property (*b*), "a right of entry, whether immediate or future, and whether vested or contingent, into or upon any tenements or hereditaments in England of any tenure, may be disposed of by deed." It has been held, however, that this does not apply to the case of a condition in a lease broken before alienation of the reversion (*c*). In *Hunt* v. *Bishop*, Pollock, C.B., said:—

"We think that the 8 & 9 Vict. c. 106, does not relate to a right to re-possess or re-enter for a condition broken, but only to an original right where there has been a disseisin, or where the party has a right to recover lands, and his right of entry and nothing but that remains."

And again, Maule, J., said:—

"It does not mean a right of entry for a forfeiture, but a right of entry in the nature of an estate or interest, that is, where a person by lapse of time has lost everything except his right of entry."

Jessel, M.R., explained (*d*):—

"The reason why a right of entry for condition broken was not assignable by virtue of 8 & 9 Vict. c. 106, s. 6, may be taken to be, that it was at the election of the person entitled to enter whether he would take advantage of the breach of the condition."

By the Conveyancing and Law of Property Act, 1881 (*e*), it is enacted in regard to leases made since 1881, that every condition of re-entry and other condition therein contained, shall be an-

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(*z*) Co. Litt. 214*b*.

(*a*) 32 Hen. VIII. c. 34; *ante*, p. 162.

(*b*) 8 & 9 Vict. c. 106, s. 6.

(*c*) *Hunt* v. *Bishop*, 8 Ex. 675; and see *Hunt* v. *Remnant*, 9 Ex. 635, and *per* Maule, J., 640.

(*d*) *Jenkins* v. *Jones*, 9 Q. B. D. 131.

(*e*) 44 & 45 Vict. c. 41, s. 10.

nexed and shall be incident to and shall go with the reversionary estate immediately expectant on the term: and shall be capable of being enforced and taken advantage of by the person entitled, subject to the term, to the income of the land leased.

By the Wills Act (*g*), all rights of entry for conditions broken and other rights of entry may be disposed of by will.

Conditions:—Impossible, Illegal, Repugnant.

No condition can operate by way of defeasance of an estate, if it be either impossible, or contrary to law, or repugnant to the estate itself (*h*).

In the case of a condition precedent being or becoming impossible to be performed, the estate will not arise (*i*); but in the case of an impossible condition subsequent, the estate will become absolute; so also if the condition be illegal; and conditions which are repugnant to the estate are absolutely void (*k*).

The following examples are given by Blackstone (*l*):—

"If a feoffment be made to a man in fee simple, on condition that, unless he goes to Rome in twenty-four hours, or unless he marries with Jane S. by such a day (within which time the woman dies, or the feoffor marries her himself), or unless he kills another, or in case he aliens in fee, then, and in any of such cases, the estate shall be vacated and determined; here the condition is void, and the estate made absolute in the feoffee. For he hath by the grant the estate vested in him, which shall not be defeated afterwards by a condition either impossible, illegal, or repugnant. But if the condition be precedent, or to be performed before the estate vests, as a grant to a man that, if he kills another or goes to Rome in a day, he shall have an estate in fee; here, the void condition being precedent, the estate which depends thereon is also void, and the grantee shall take nothing by the grant: for he hath no estate until the condition be performed."

Another instance of illegality is a devise subject to a condition in general restraint of marriage; there a limitation over is of no effect (*m*). But not so where the object of the testator is not to restrain marriage, but to provide for a person while unmarried; as, where the gift to a woman for her life was subject to a proviso that she should "remain in her present state of single woman," but if she should marry, then the property should go over to another, it was held there was nothing illegal in the proviso, and on her marriage her estate ceased (*n*).

The above instances sufficiently illustrate the avoidance of a

(*g*) 1 Vict. c. 26, s. 3.
(*h*) 2 Cruise Dig. 4; Co. Litt. 206*b*.
(*i*) Co. Litt. 206*b*; *Walker* v. *Walker*, 2 De G. F. & J. 255.
(*k*) 2 Bl. 156; Co. Litt. 206*b*.
(*l*) Vol. ii. 157.
(*m*) Elph. Introd. 404.
(*n*) *Jones* v. *Jones*, 1 Q. B. D. 279.

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condition by its impossibility or illegality; but the case of avoidance by repugnancy may require more explanation. Suppose an estate were granted to one, whether for life, in fee, or for years, it would be the legal result of such a grant that the grantee should have the power of dealing with the property to the extent of his interest in it, and consequently, whatever that interest might be, of alienating it. To annex to such a grant a condition that the grantee should not alienate, would be at variance with, in other words repugnant to, the very grant itself; such a condition, accordingly, the Court holds to be void (*o*). This must not be confused with a limitation of an estate to a man for his life, *until* he shall become bankrupt or charge it; for there the limitation itself is for an interest less than a life estate, and is different from a limitation in the first instance for life, followed by a proviso that the grantee shall not sell or alien it, where the proviso is repugnant to the estate limited (*p*). But a limitation to A. until his bankruptcy is not allowed to have effect, so as to determine his interest on bankruptcy, if the estate belonged to the bankrupt originally and was settled by him (*e.g.*) on marriage (*q*). The provision that a married woman shall not dispose, by way of anticipation, of the income of property settled to her separate use, may appear to be a repugnant condition; but it is not so, for, separate use being the creature of equity, equity may limit her power in aliening property which without equity she would have no power to alien (*r*).

Mortgages.

II. Mortgages what—at law.

A mortgage of land is a conveyance of the land by a borrower (the mortgagor) to a lender (the mortgagee) by way of security for the repayment of the loan. The mortgage deed in practice always includes also personal covenants by the mortgagor for repayment of the principal money and interest thereon; and, in

(*o*) See the subject discussed in *Re Machu*, 21 Ch. D. 838; *Re Rosher*, 26 Ch. D. 801; *Re Dugdale*, 38 Ch. D. 176; and *Corbett* v. *Corbett*, 14 P. D. 7.

(*p*) *Brandon* v. *Robinson*, 18 Ves. 433, *per* Lord Eldon; *ante*, p. 108; Elph. Introd. 302. In some cases a gift to A. for life, with remainder to B., followed by a proviso on condition that, if A. should attempt to alienate, his life estate shall cease, the instrument has been construed as giving to A. an estate for life *or until* he should attempt to assign, and upon that event or after his death, over, and such a limitation is held valid: see *e.g. Joel* v. *Mills*, 3 K. & J. 458.

(*q*) *In re Pearson*, 3 Ch. D. 807. See above, p. 108, where this subject is more fully explained.

(*r*) *Brandon* v. *Robinson*, 18 Ves. 435, *per* Cotton, L.J., in *Corbett* v. *Corbett*, 14 P. D. at p. 11; *Ante*, p. 108.

the absence of an express covenant, the mortgagor would be personally liable, but only as for a simple contract debt (*s*).

The ancient form of a mortgage was a conveyance of the estate followed by a proviso or condition making the conveyance void on payment of the mortgage debt and interest at a given day. A mortgage in this form affords an instance of the use of a condition subsequent to defeat an estate (*t*).

But, says Mr. Davidson (*u*):—

"This form was extremely objectionable, on account of the strictness with which conditions are construed, and of the difficulty of preserving evidence of the payment of the mortgage money on the exact day appointed. The money was seldom paid on the day appointed, and it became the practice to procure a reconveyance from the mortgagee on all occasions, so as to render it certain that the legal estate had again vested in the mortgagor."

The modern form of a mortgage of freeholds is an absolute conveyance of lands by the mortgagor to the mortgagee, subject to an agreement (called the "proviso for redemption") that, if the mortgagor repay the sum lent with interest on a day named, the mortgagee will reconvey the premises. The estate in fee simple thus passes to the mortgagee, but subject to the proviso that he will reconvey upon payment on the day named; and the payment does not of itself, without reconveyance, put an end to the estate vested in the mortgagee. So entirely does the legal estate pass to the mortgagee, that, unless there be a re-demise to the mortgagor (to be spoken of presently), the period of limitation (also to be spoken of presently), within which the mortgagee may bring his action to recover the premises mortgaged, will, if no interest is paid, and no acknowledgment of his title is made by the mortgagor, be calculated from the date of the execution of the mortgage-deed (*x*). Again, in the case of any mortgage made before the 31st December, 1881, except by agreement in writing after such date between the mortgagor and mortgagee (*y*), the mortgagor cannot, in the absence of express provision contained in the mortgage, grant a lease without the concurrence of the

(*s*) *Per* Lord Thurlow, C., *Ancaster* v. *Mayer*, 1 Bro. C. C. 454, at p. 464; S. C., 1 W. & T. Where there is no covenant to pay interest after the day named for repayment of the principal, the mortgagee may recover damages limited to £5 per cent. in lieu of subsequent interest; *Re Roberts*, 14 Ch. D. 49; see *Mellersh* v. *Brown*, 45 Ch. D. 225.

(*t*) See Elph. Introd. 132; 2 Cruise, Dig. Tit. xv. p. 65; 1 Spence, 153; *Ib.* 601; 2 Spence, 614.

(*u*) 2 Dav. Prec. pt. ii. 31.

(*x*) *Doe* v. *Lightfoot*, 8 M. & W. 553.

(*y*) 44 & 45 Vict. c. 41, s. 18, § 16, *post*, p. 191. See Elph. Introd. 147.

mortgagee (*z*); and, in such leases, the covenants by the lessee must be entered into with the mortgagee so that they may run with the land (*a*). It is, however, provided by the Judicature Act, 1873 (*b*), that:—

> S. 25 (5). "A mortgagor, entitled for the time being to the possession or receipt of the rents and profits of any land, as to which no notice of his intention to take possession or to enter into the receipt of the rents and profits thereof shall have been given by the mortgagee, may sue for such possession, or for the recovery of such rents or profits, or to prevent or recover damages in respect of any trespass or other wrong relative thereto, in his own name only, unless the cause of action arises upon a lease or other contract made by him jointly with any other person."

Strictly speaking the mortgagee has (subject of course to any subsisting tenancies created by the mortgagor before the mortgage) a right to the possession, as a consequence of the conveyance to him of the estate; but from the nature of the transaction it is seldom desired by the parties that the mortgagee should take possession, and in practice the mortgagor remains in possession.

> "The possession of the mortgaged land by the mortgagor, during the subsistence of the security, and while the mortgagee did not choose to take possession, was held (at law as well as in equity) to be 'at the will,' or by the 'sufferance' or 'permission' of the mortgagee, under a 'tacit agreement,' which the mortgagee might determine at his pleasure. It was of the nature of the transaction that the mortgagor should continue in possession. His possession was rightful and not by wrong. He was entitled to the rents and profits as long as he remained in possession; mesne profits accrued due and received prior to action or demand could not be recovered from him by the mortgagee" (*c*).

The right of retaining possession till the day named for payment is sometimes expressly reserved to the mortgagor, the stipulation that he shall remain in possession operating as a

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(*z*) See *per* Lord Selborne, L.C., in *Corbett* v. *Plowden*, 25 Ch. D. at p. 681.

(*a*) See 1 Da. 116.

(*b*) 36 & 37 Vict. c. 66, s. 25 (5); see *Yorkshire Banking Co.* v. *Mullan*, 35 Ch. D. 125.

(*c*) *Per* Lord Selborne, C., in *Heath* v. *Pugh*, 6 Q. B. D. at p. 359. See as to the right of the mortgagor in possession to rents and profits, *Higgins* v. *York Buildings Co.*, 2 Atk. 107; *Drummond* v. *St. Albans*, 5 Ves. 438; *E. of Clarendon* v. *Barham*, 1 Y. & C. C. C. 688; and the mortgagee has no right to growing crops unless he takes possession, *Ex parte Temple*, 1 Gl. & J. 216; see 2 Spence, 646, and 657, note (1). See as to the right of an occupier to compensation in respect of crops from a mortgagee taking possession, The Tenants Compensation Act, 1890, 53 & 54 Vict. c. 57, s. 2.

re-demise (*d*); but, if the day named for payment pass without payment, the mortgagee may enter or bring an action for possession, even against a tenant (if the mortgage is made before 1882) without giving notice to quit, if such tenant claim under a lease from the mortgagor granted after the mortgage without the privity of the mortgagee (*e*).

The doctrine was clearly enunciated (*f*) by Lord Mansfield as follows:—

"This is an ejectment, brought for a warehouse in the City, by a mortgagee, against a lessee under a lease in writing for seven years, made after the date of the mortgage, by the mortgagor, who had continued in possession. The lease was at a rack-rent. The mortgagee had no notice of the lease, nor the lessee any notice of the mortgage. The defendant offered to attorn to the mortgagee before the ejectment was brought. The plaintiff is willing to suffer the defendant to redeem. There was no notice to quit: so that, though the written lease should be bad, if the lessee is to be considered as tenant from year to year, the plaintiff must fail in this action. The question, therefore, for the Court to decide is, whether by the agreement understood between mortgagors and mortgagees, which is, that the latter shall receive interest, and the former keep possession, the mortgagee has given an implied authority to the mortgagor to let from year to year at a rack-rent; or whether he may not treat the defendant as a trespasser, disseisor, and wrongdoer. No case has been cited where this question has been agitated, much less decided. The only case at all like the present, is one that was tried before me on the Home Circuit; but there the mortgagee was privy to the lease, and afterwards by a knavish trick wanted to turn the tenant out. I do not wonder that such a case has not occurred before. Where the lease is not a beneficial lease (*g*), it is for the interest of the mortgagee to continue the tenant; and where it is, the tenant may put himself in the place of the mortgagor, and either redeem himself (*h*), or get a friend to do it. The idea that the question may be more proper for a Court of Equity goes upon a mistake. It emphatically belongs to a Court of Law, in opposition to a Court of Equity; for a lessee at a rack-rent is a purchaser for a valuable consideration, and in every case between purchasers for a valuable consideration, a Court of Equity must follow, not lead the law. On full consideration, we are all clearly of opinion, that there is no inference of fraud or consent against the mortgagee, to prevent him from considering the lessee as a wrongdoer. It is rightfully admitted that if the mortgagee had encouraged the tenant to lay out money, he could not maintain this action; but here the question

(*d*) Notes to *Keech* v. *Hall*, 1 Sm. L. Ca.

(*e*) *Keech* v. *Hall*, Dougl. 21; S. C. 1 Sm. L. Ca.

(*f*) In *Keech* v. *Hall*, 1 Sm. L. Ca.

(*g*) *I.e.*, a lease for the grant of which the lessor receives a premium or lump sum, so that the rent reserved is less than a rack-rent. A lease may also become beneficial owing to a rise in the value of the thing demised during the term granted by the lease.

(*h*) See *Tarn* v. *Turner*, 39 Ch. D. 456.

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turns upon the agreement between the mortgagor and the mortgagee: when the mortgagor is left in possession, the true inference to be drawn is an agreement that he shall possess the premises at will in the strictest sense, and therefore no notice is ever given him to quit, and he is not even entitled to reap the crop, as other tenants at will are, because all is liable to the debt (*i*); on payment of which the mortgagee's title ceases. The mortgagor has no power, express or implied, to let leases not subject to every circumstance of the mortgage. If, by implication, the mortgagor had such a power, it must go, to a great extent, to leases where a fine is taken on a renewal for lives. The tenant stands exactly in the situation of the mortgagor. The possession of the mortgagor cannot be considered as holding out a false appearance. It does not induce a belief that there is no mortgage: for it is the nature of the transaction that the mortgagor shall continue in possession."

But though an agreement, to be collected from the mortgage deed, that the mortgagor shall remain in possession for a time certain, operates as a re-demise, an agreement that the mortgagee may enter upon, or the mortgagor hold until, a default, the time of which is uncertain, cannot operate as a re-demise for want of certainty (*k*). In modern practice, therefore, to prevent any question whether there has been a re-demise to the mortgagor, it is usual not to insert any proviso or covenant for quiet enjoyment by the mortgagor till default (*l*); but the covenant for quiet enjoyment by the mortgagee is made to commence in operation after default. This does not postpone the mortgagee's right of entry (even without the notice or demand (*m*), which would be necessary where the relationship of landlord and tenant has been created (*n*), or disable him from bringing his action for possession at once (*o*). The same form of covenant is implied under the Conveyancing and Law of Property Act, 1881 (*p*).

Power of leasing under Conveyancing Act, 1881.

Now, in the case of a mortgage made after the 31st December, 1881, by the Conveyancing and Law of Property Act, 1881 (*q*), power is given to the person *in possession*, whether mortgagor or mortgagee, to make or agree to make (*r*) an agricultural or occupation lease for any term not exceeding twenty-one years, and a building lease for any term not exceeding ninety-nine years. The

(*i*) But a mortgagee is not entitled to make the mortgagor account for back rents or profits during the mortgagor's possession; *Yorkshire Banking Co.* v. *Mullan*, 35 Ch. D. 127.

(*k*) Notes to *Keech* v. *Hall*, 1 Sm. L. Ca. 580. See *ante*, p. 152.

(*l*) See 2 Dav. pt. ii. p. 450.

(*m*) *Doe* d. *Garrod* v. *Olley*, 12 A. & E. 481; *Doe* d. *Snell* v. *Tom*, 4 Q. B. 615. Fisher on Mortgages, 407.

(*n*) *Ib.* 408.

(*o*) *Doe* v. *Lightfoot*, 8 M. & W. 553; and 2 Dav. pt. ii. p. 111, and see form, *ib.* 314.

(*p*) 44 & 45 Vict. c. 41, s. 7 (1) (C).

(*q*) *Ib.* s. 18.

(*r*) *Ib.* s. 18, sub-ss. (12) and (17).

rent and benefit of the lessee's covenants and the obligation of the lessor's covenants will be annexed to and go with the reversionary estate in the land immediately expectant on the term (*s*). For the protection of the mortgagee in the case of a lease by the mortgagor, the latter is to deliver to him within one month after making the lease a counterpart of the lease duly executed by the lessee (*t*). But such power is given only if and as far as a contrary intention is not expressed in the mortgage deed, or otherwise in writing: and the mortgage deed may reserve to or confer on the mortgagor or the mortgagee, or both, further or other powers of leasing (*u*).

The same provisions or any of them may be applied to a mortgage made before January 1st, 1882, by agreement in writing made after 31st December, 1881, between mortgagor and mortgagee (*x*).

By the same Act (*y*), where land subject to any incumbrance is sold by the Court, or out of Court, the Court may, on the application of any party to the sale, direct or allow payment into Court of an amount sufficient to meet the incumbrance, together with interest, and to provide for costs and expenses, and upon such payment the Court may declare the land to be freed from the incumbrance.

It will be remembered that in the old form of mortgage, in place of the modern proviso for redemption, was a condition that on payment on the day named, the conveyance should become void (*z*). Hence the origin of the term "mortgage" is thus given by Littleton:—

"If a feoffment be made upon such condition, that if the feoffor pay to the feoffee at a certain day, &c., £40 of money, that then the feoffor may re-enter, &c., in this case the feoffee is called tenant in *morgage*, which is as much to say, in French, as *mort gage*, and in Latin, *mortuum vadium*. And it seemeth that the cause why it is called mortgage is, for that it is doubtful whether the feoffor will pay at the day limited such sum or not: and if he doth not pay, then the land which is put in pledge upon condition for the payment of the money, is taken from him for ever, and so dead to him upon condition, &c. And if he doth pay the money, then the pledge is dead as to the tenant, &c." (*a*).

(*s*) Ss. 10—11. As to leases under s. 18, see *Municipal &c. Building Society v. Smith*, 22 Q. B. D. 70.

(*t*) S. 18, sub-ss. 11, 17.

(*u*) S. 18, sub-ss. 13, 14. As to the detrimental effect on the mortgagee of excluding the mortgagor's power of leasing, see note by Messrs. Wolstenholme & Turner, in their edition of the Act, p. 58; and in 2 K. & E. p. 47.

(*x*) S. 18, sub-s. 16.

(*y*) S. 5.

(*z*) *Ante*, p. 187.

(*a*) Litt. S. 332. By "tenant" here is

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Such is a mortgage at common law, under which the mortgagor had no legal right to redeem except upon payment at the day named in the proviso for redemption, and which regarded the estate, after default made by the mortgagor in payment at that day, as belonging to the mortgagee absolutely.

In equity—what.

But equity regarded the mortgagee as having only a security for the money lent, which was part of his personal estate, and so at death devolved on his executors or administrators, for whom the devisee or heir was but a trustee of the bare legal estate in the land which was the security.

By the Conveyancing and Law of Property Act, 1881 (*b*), it is enacted that where an estate or interest of inheritance, or limited to the heir as special occupant (*c*), in any tenements or hereditaments, is vested by way of mortgage in any person solely, the same shall on his death, notwithstanding any testamentary disposition, devolve to and become vested in his personal representatives from time to time, in like manner as if the same were a chattel real vesting in them. But this applies only to cases of death after the 31st December, 1881. By the Copyhold Act, 1887 (*d*), it is provided that this section shall not apply to land of copyhold or customary tenure vested in the tenant on the Court Rolls by way of mortgage.

Equity of redemption.

The principle upon which equity interfered to mitigate the rigour of the common law in its treatment of mortgage transactions was that the property mortgaged is but a security for the repayment of the money lent; and therefore it was established that in equity a reconveyance of the estate will be decreed, on payment of the principal, interest, and costs even after the day named for payment has gone by; and notwithstanding that the mortgagee may have entered into possession. The right of the mortgagor to this relief is called his "equity of redemption" as distinguished from the *legal* right to redeem given by the proviso for redemption on payment at the day named (*e*). The right

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meant the mortgagee, who holds the legal estate. Littleton's derivation was doubted by Mr. J. Williams, R. P. p. 486.

(*b*) 44 & 45 Vict. c. 41, s. 30.

(*c*) *Ante*, p. 35.

(*d*) 50 & 51 Vict. c. 73, s. 45. In *Re Mills*, 37 Ch. D. 312, North, J., held that this provision is retrospective; but the Court of Appeal found it unnecessary to decide the point and expressed no opinion upon it: S. C., 40 Ch. D. 14.

(*e*) "It may be worth remarking how great an interval in the progress of jurisprudence is marked at one extremity by the term 'mortgage' applied according to Littleton's etymology; and at the other extremity, by the rule 'once a mortgage always a mortgage,' by which,

was, however, limited by the rule of the Court of Chancery that it must be exercised within a reasonable time: and therefore the mortgagee was allowed to apply to the Court to enforce the security by "foreclosure," *i.e.*, by a decree that, unless the mortgagor redeem within a given time, his equity of redemption shall be barred and extinguished (*ee*). In cases in which the mortgagee has taken possession, the Act for the Limitation of Actions and Suits relating to Real Property (*f*), restricted the exercise of the right of redemption to a period of twenty years next after the time at which the mortgagee should have taken possession, unless in the meantime there should have been an acknowledgment in writing by the mortgagee of the title of the mortgagor or of his right of redemption, in which case the time for redemption was to run from the date of acknowledgment; and by the substituted provision in the Real Property Limitation Act, 1874 (*g*), which came into operation on 1st January, 1879, the mortgagor is to be barred at the end of twelve years from the date of the mortgagee obtaining possession, or acknowledging in writing the title of the mortgagor or his right to redemption.

Limitation of time for redemption, where mortgagee in possession.

On the other hand, as to mortgagees who have not taken possession, doubts having arisen as to the effect of the first-mentioned Act (*h*), an amending Act (*i*) was passed, giving to the mortgagee the right to make an entry, or bring an action or suit to recover the land at any time within twenty years next after the last payment of any part of the principal or interest, although more than twenty years have elapsed since the right to make the entry, or to bring action or suit, first accrued.

Limitation of mortgagee's right to recover possession of land mortgaged.

By the Real Property Limitation Act, 1874 (*j*), this amending Act is to be read as if the period of twelve years had been therein mentioned, instead of the period of twenty years.

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in spite of the terms and primary import of the contract, it is, in the view of the law, necessarily and unalterably a pledge, unless and until, by judicial process, or by the operation of the Statutes of Limitation, the character of creditor is exchanged for that of owner," 2 Dav. pt. ii. p. 7. See *Northampton* (*Marquess of*) v. *Pollock*, 45 Ch. D. 190. See further, as to the nature of an equity of redemption, 2 Cruise, Dig. 92 *et seq.*; 1 Spence, 601; 2 *Ib.* 616, and 642; *Casborne* v. *Scarfe*, 2 W. & T.; *per* Lord Selborne, C., in *Heath* v. *Pugh*, 6 Q. B. D. 345, at p. 360. As to the history of the interference of equity, see Kerly on the Equitable Jurisdiction of the Court of Chancery, 143.

(*ee*) *Campbell* v. *Holyland*, 7 Ch. D. 166, 171, per Jessel, M.R.

(*f*) 3 & 4 Wm. IV. c. 27, s. 28.

(*g*) 37 & 38 Vict. c. 57, s. 7.

(*h*) See *Doe* d. *Jones* v. *Williams*, 5 Ad. & E. 291.

(*i*) 1 Vict. c. 28.

(*j*) 37 & 38 Vict. c. 57, s. 9.

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Limitation of time to recover mortgage money.

By the same Act (*k*) it is enacted that no action, or suit, or other proceeding, shall be brought to recover any sum of money secured by any mortgage, &c., but within twelve years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same, unless in the meantime some part of the principal money, or some interest thereon, shall have been paid, or some acknowledgment of the right thereto shall have been given in writing signed by the person by whom the same shall be payable, or his agent, to the person entitled thereto, or his agent; and in such case no such action, or suit, or proceeding, shall be brought but within twelve years after such payment or acknowledgment, or the last of such payments or acknowledgments if more than one, was given.

Enforcement of equity.

The mortgagor can enforce his equity of redemption, by bringing against the mortgagee an action to redeem; and if the mortgagee brings an action of foreclosure, the decree allows a time (usually six months) within which the mortgagor may redeem (*kk*).

Mortgagee's power of sale.

In addition to his remedy by way of foreclosure, a mortgagee can generally enforce his security by selling the mortgaged property, either under an express power of sale contained in the mortgage, or, in the absence of such a power, by availing himself of the powers conferred by statute in that behalf (*l*).

Notice before repayment.

As it has been usual to provide that the mortgagee shall not exercise his power of sale for six months after notice of his intention to sell, so, if after the day named for repayment of the loan has passed, the mortgagor wishes to pay it off, the mortgagee is, in general, entitled to six months' notice in writing, or six months' interest in lieu of notice (*m*). Under the Conveyancing and Law of Property Act, 1881, the power of

(*k*) 37 & 38 Vict. c. 57, s. 8. This applies also to the personal remedy on a covenant or bond to pay the money: *Sutton* v. *Sutton*, 22 Ch. D. 511; *Fearnside* v. *Flint*, *ib.* 579.

(*kk*) For forms of judgment in redemption actions, see Seton on Decrees, 1040; Pemberton on Judgments, 586.

(*l*) These statutory powers are incident only to mortgages made by deed. As to such mortgages made after 28 August, 1860, the power was given by Lord Cranworth's Act, 23 & 24 Vict. c. 145, Part ii., which is repealed and replaced as to mortgages made after 31 December, 1881, by the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 19. See as to the statutory power and in what respects it differs from the ordinary express power, 2 K. & E. 22, notes.

(*m*) 2 Da. ii. 34, 35. But if he take proceedings to enforce payment, he is entitled to interest only to the date of payment: *Re Alcock*, 23 Ch. D. 372. If the mortgagor fails to pay at the expiration of six months' notice, the mortgagee is entitled to a further six months' notice: Wms., R. P. 496.

sale conferred by that Act may be exercised after *three* months' notice (*n*).

Mortgage by deposit of deeds.

Notwithstanding the Statute of Frauds, which requires an agreement relating to lands to be in writing (*o*), a mere deposit of deeds without any writing, as a security for a loan, may operate as an equitable mortgage in respect of the lands comprised in the deeds; on the principle that such deposit is evidence of an agreement to make a mortgage (*p*); but it is in all cases a question of the intention of the parties.

The question has been much discussed whether the remedy to which the mortgagee by deposit is entitled is foreclosure or sale (*q*). It was decided that where there had been a deposit of deeds simply, the remedy was by foreclosure (*r*); but where the deposit was accompanied with a memorandum whereby the depositor agreed to "execute a good and effectual mortgage," the equitable mortgagee was held entitled to foreclosure or sale, and a sale was ordered under the Chancery Procedure Act, 1852 (*s*). Now under the provisions of the Conveyancing and Law of Property Act, 1881 (*t*), the High Court can direct a sale in either case, for it can do so in any action, whether for foreclosure or for sale, or for the raising and payment in any manner of the mortgage money (*u*).

Foreclosure.

At any time after the day of payment appointed in the proviso for redemption, the mortgagee may bring his action for foreclosure of the equity of redemption in the mortgaged premises against the mortgagor or his successor in title, as owner of the estate subject to the mortgage (*v*). The defendant is generally given six calendar months from decree to redeem; and, if such time be not enlarged, the mortgagee is then entitled to an order for fore-

(*n*) 44 & 45 Vict. c. 41, s. 20 (i.).

(*o*) 29 Car. II. c. 3, s. 4.

(*p*) *Ex parte Haigh*, 11 Ves. 403. For examples, see Coote, 342. Also see 2 Da. i. 105 (*c*); 2 Spence, 780; notes to *Russel* v. *Russel*, in 1 W. & T. 773; and *Ex parte Broderick*, 18 Q. B. D. 380, 766.

(*q*) See Fisher on Mortgages, 480, and 2 Da. ii. 69.

(*r*) *James* v. *James*, L. R. 16 Eq. 153, and *Backhouse* v. *Charlton*, 8 Ch. D. 444.

(*s*) 15 & 16 Vict. c. 86, s. 48; *York Union Banking Co.* v. *Artley*, 11 Ch. D. 205. As to the proper form of the foreclosure order, see *Lees* v. *Fisher*, 22 Ch. D. 283.

(*t*) 44 & 45 Vict. c. 41, s. 25; repealing (*ib.* (6) and 2nd sched. pt. ii.) the 48th section of 15 & 16 Vict. c. 86.

(*u*) *Oldham* v. *Stringer*, W. N. 1884, p. 235; S. C., 33 W. R. 251.

(*v*) See form of claim in App. C. s. ii. No. 5, Rules of Supreme Court, 1883. County Courts have jurisdiction in foreclosure or redemption where the mortgage does not exceed £500; County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 67.

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closure absolute (*x*). And where the mortgagor brings his action against the mortgagee for redemption, the dismissal of such action by reason of the money not being paid at the appointed time is equivalent to an order absolute for foreclosure (*y*).

Sale —under order of Court;

By the Chancery Procedure Act, 1852 (*z*), the Court was empowered in any suit for the foreclosure of the equity of redemption in any mortgaged property, to direct a sale instead of foreclosure on such terms as it might think fit. The operation of this section was limited, and it has been repealed by the Conveyancing and Law of Property Act, 1881 (*a*), and thereby the relief by sale is given not only to the mortgagee, but also to any person entitled to redeem. It provides that such person may have a judgment or order for sale instead of for redemption in an action brought by him for redemption alone or for sale alone, or for sale or redemption in the alternative (*b*). And it empowers the High Court in any action whatever for foreclosure, or for redemption, or for sale, or for the raising and payment in any manner of mortgage money, if it thinks fit, to direct a sale of the property on such terms as it thinks fit, and without allowing any time for redemption or payment (*c*). This power may be exercised by the Court at any time before foreclosure absolute (*d*). And the Court is empowered in an action brought by a person interested in the right of redemption and seeking a sale, to direct the plaintiff to give security for costs, and may give the conduct of the sale to any defendant (*e*). In the case of bankruptcy of the mortgagor, the mortgagee may apply to the Bankruptcy Court for sale of the mortgaged property, and the Court may order a sale accordingly (*f*).

—under mortgage deed, or statutory power.

It was the practice to insert in mortgages made before 1882 a power of sale (*g*) by the mortgagee to arise after default in payment of the debt, whereby he was enabled, without reference to

(*x*) As to form of judgment in foreclosure actions, see Seton on Decrees, vol. ii. pp. 1035 *et seq.*; Pemberton on Judgments, 542; and orders for final foreclosure absolute in Seton, vol. ii. p. 1089; Pemberton, 599; *Hunter* v. *Myatt*, 28 Ch. D. 181; *Withall* v. *Nixon*, *ib.* 413; and *Doble* v. *Manley*, *ib.* 664.

(*y*) 2 Da. pt. ii. 36.

(*z*) 15 & 16 Vict. c. 86, s. 48.

(*a*) 44 & 45 Vict. c. 41, s. 25, sub-s. 6.

(*b*) S. 25, sub-s. 1.

(*c*) S. 25, sub-s. 2.

(*d*) See *Union Bank of London* v. *Ingram*, 20 Ch. D. 463.

(*e*) 44 & 45 Vict. c. 41, s. 25, § 3. See *Woolley* v. *Colman*, 21 Ch. D. 169; and *Weston* v. *Davidson*, W. N. (1882), p. 28.

(*f*) Bankruptcy Rules, 1886, rules 73—77. See *In re Jordan*, 13 Q. B. D. 228.

(*g*) See this explained in Elph. Introd. 150.

the mortgagor or to the Court, to sell the property and repay himself out of the proceeds (*h*). By Lord Cranworth's Act (*i*), a power of sale, with its subsidiary powers, was made incident to mortgages: but, as in the main the power given by the Act was less beneficial to the mortgagee than the express power usually inserted in a mortgage deed, it was the practice to insert a power of sale in the deed, and thereby to vary the powers conferred by the Act, without negativing the operation of the Act altogether (*k*).

Now, by the Conveyancing and Law of Property Act, 1881 (*l*), the above enactment has been repealed; but such repeal is not to affect any operation, effect, or consequence of any instrument executed before the 1st January, 1882. And by the same Act, in regard to mortgage deeds executed after 31st December, 1881, if and as far as a contrary intention is not expressed in the deed, a power of sale, with its incidents, similar to that which has been usually inserted in a mortgage deed (including the power to give a receipt for the sale money, or for any money or securities comprised in his mortgage or arising thereunder), is conferred on the mortgagee (*m*). The provisions of the Act in this respect may be varied or extended by the deed (*n*). It is therefore not now the practice to insert an express power of sale.

Mortgagee entering into possession.

In addition to the above remedies, the mortgagee may enter into possession of the mortgaged property; but that is a course which he is usually slow to adopt. The law in regard to this is thus stated by Mr. Davidson (*o*):—

"After default has been made in payment of the principal money or interest, or immediately after the execution of the mortgage, if there be no proviso for quiet enjoyment by the mortgagor until default, the mortgagee may enter into possession of the land, or, by giving notice to the tenants, into the receipt of the rents and profits; but the situation of a mortgagee in possession is far from an eligible one. On the principle that a mortgagee must make no advantage out of his mortgage beyond

(*h*) For forms, see Dav. Conc. Prec. 188, 192; 2 K. & E. 22.

(*i*) 23 & 24 Vict. c. 145, pt. ii.

(*k*) See s. 32. As to the objections to relying on the powers under Lord Cranworth's Act, see 2 Da. pt. ii. p. 89; Fisher on Mortgages, 473.

(*l*) 44 & 45 Vict. c. 41, s. 71.

(*m*) Ss. 19—22.

(*n*) S. 19 (2).

(*o*) 2 Da. pt. ii. pp. 90—92; and see *Noyes* v. *Pollock*, 32 Ch. D. 53; where it was held by the C. A. that the fact that mortgagees are in receipt of the rents and profits of the mortgaged estate, does not necessarily make them chargeable as mortgagees in possession, but that the question whether they are mortgagees in possession depends upon whether they have taken out of the mortgagor's hands the power and duty of managing the estate and dealing with the tenants.

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the payment of principal, interests, and costs, he is bound to account, upon terms of great strictness. The common decree is for an account 'of what he has received, or what he might have received, without his own wilful default.' He is chargeable with an occupation rent in respect of property in hand, and is liable for voluntary waste (as in pulling down houses, or opening mines); and it is by no means a matter of course that he should be allowed the cost of improvements. He may charge his actual expenses, but cannot stipulate for an allowance or commission to himself for the trouble of collecting the rents; nor can he on any pretext charge for his trouble in collecting the rents."

Power to cut timber.

By the Conveyancing and Law of Property Act, 1881 (*p*), in the case of a mortgage deed executed after 31st December, 1881, power is conferred on a mortgagee while in possession, to cut and sell timber and other trees ripe for cutting, and not planted or left standing for shelter or ornament.

Receiver.

In continuation of the passage above quoted, Mr. Davidson proceeds:—

"But, although the mortgagee is precluded from charging for his own trouble in collecting, he is not obliged in all cases to take that trouble. He may, of his own authority, appoint a receiver, whenever the distance or the nature of the property is such as would require much time and trouble for the collection of the rents, and may allow and charge a reasonable remuneration for the services of such receiver. The remuneration allowed is generally five per cent. on the amount of rents collected; it may, of course, be less; but, unless in very extraordinary cases, it should not exceed that rate. A receiver so appointed is, of course, the agent of the mortgagee only. His possession is that of the mortgagee, who is chargeable with equal strictness, whether he receives the rents himself or through his agent. In either case, his position (as it has been sometimes expressed) is that of a bailiff without a salary, accountable to the mortgagor, but not paid by him. In order to enable the mortgagee to avail himself of the mortgage security (especially for keeping the interest regularly paid), without either incurring the responsibilities of a mortgagee in possession, or having recourse to his power of sale, it is usual, where any difficulty is apprehended, for the mortgagee to require from the mortgagor an attornment or power of distress (*r*) in respect of or over such part of the mortgaged property as may be in hand, by which he acquires the same remedy by distress as a landlord has for recovering rent in arrear; and, in respect of the property in the occupation of tenants, the appointment of a receiver, who is in law the agent and attorney of the mortgagor (*s*), and in respect of

(*p*) 44 & 45 Vict. c. 41, s. 19 (1) (iv.).

(*r*) These clauses are now practically seless owing to the provisions of the Bills of Sale Act, 1878 (41 &. 42 Vict. c. 31), s. 6; *Re Willis*, 21 Q. B. D. 384; see 2 K. & E. 52, and 34 Solicitors' Journal, 704, 716.

(*s*) Being appointed under an authority given by the mortgagor, and not, as in the case first mentioned by Mr. Davidson, by the mortgagee alone, without any power from the mortgagor.

whose acts and receipts the mortgagee is, consequently, under no liability, but who is, in effect, the nominee of the mortgagee, and continued during his pleasure, and whose special duty it is to pay the mortgagee out of the rents received. The provisions of the class here described are more commonly restricted in their objects to providing for the regular payment of interest; but, of course, they may be, and sometimes are, extended to providing for the liquidation of the principal by instalments or otherwise."

Statutory power to appoint receiver.

The power of appointing a receiver was conferred on mortgagees by Lord Cranworth's Act (*t*), but though the statutory powers thereby given were as beneficial, or nearly so, to the mortgagee as those commonly conferred by the mortgage deed (where it contains any such power), they were thought by some to be unduly stringent on the mortgagor, in subjecting him to the liability of having a receiver appointed (as the Act authorises) if the mortgage money remained owing beyond the stipulated time, though there were no other default. It was therefore sometimes thought expedient to exclude the operation of this statute. These provisions of Lord Cranworth's Act have, to the extent above mentioned, been repealed (*u*), and in lieu thereof, in the Conveyancing and Law of Property Act, 1881 (*x*), with regard to mortgages executed after 31st December, 1881, powers are given corresponding to those usually inserted in a mortgage deed, for the mortgagee to appoint a receiver of the income of the property when the mortgage money has become due, but not until he has become entitled to exercise the power of sale conferred by the Act.

Receiver appointed by Court for legal mortgagee.

Under the old law a legal mortgagee, *i.e.* a mortgagee who has the legal estate (and therefore a legal right to possession), could not obtain the appointment of a receiver by the Court of Chancery, because, it was said, it was his duty to take possession himself if he wanted it; but if there was a prior mortgage, so that he had no legal right (*i.e.* no right at common law) to the property, he could get a receiver appointed. But since the Judicature Act (*y*) the Court does sometimes appoint a receiver at the instance of a legal mortgagee, though he could take possession for himself (*z*).

(*t*) 23 & 24 Vict. c. 145, pt. ii. See 2 K. & E. 258.

(*u*) 44 & 45 Vict. c. 41, s. 71.

(*x*) 44 & 45 Vict. c. 41, ss. 19 and 24. See 2 K. & E. 54; *ib.* 258.

(*y*) 36 & 37 Vict. c. 66, s. 25, sub-s. 8.

(*z*) *Per* North, J., *Re Prytherch*, 42 Ch. D. 590, 600; see *Tillett* v. *Nixon*, 25 Ch. D. 238; *Mason* v. *Westoby*, 32 Ch. D. 206.

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Insurance.

For the protection of the property mortgaged, where the mortgage includes buildings, it has been usual to provide in the deed that the mortgagor shall keep the buildings insured, and that on his failure to do so, the mortgagee may pay the premiums necessary for the purpose, and add the amount to the mortgage debt (*a*). Lord Cranworth's Act (*b*) conferred a power on the mortgagee to pay the insurance on omission of the mortgagor to do so, where by the terms of the deed he ought to pay. But the provisions of that Act being very incomplete, it has been the practice to continue to insert the usual provision in the deed. And now the Conveyancing and Law of Property Act, 1881 (*c*), in regard to a mortgage made by deed executed after 31st December, 1881, has conferred on the mortgagee the powers of insurance usually inserted in mortgage deeds; the Act at the same time, to the extent above mentioned, repeals the provisions in this respect of Lord Cranworth's Act.

Pursuing all remedies at once.

While on the subject of the mortgagee's remedies (*d*), it should be mentioned that, contrary to the general rule that a person liable to be sued is not to be harassed by a multiplicity of actions, it is the right of the mortgagee, so long as any part of his debt remains unpaid, to enforce at the same time all his legal and equitable remedies (*e*). He may, at the same time, enter and take possession of the property (or bring his action for possession), sue the mortgagor on his covenant to pay, and proceed to foreclose the equity of redemption of the property (*f*) or obtain a sale by the Court. And now he may in one action, without special leave, sue upon the covenant (*g*), and also for foreclosure, and for possession (*h*). If, having foreclosed, he sell, and the proceeds of sale do not cover his debt, he cannot then sue on the covenant, or, at least, if he does so, the mortgagor, on paying the money due on the mortgage, is entitled to a reconveyance of the mortgaged property (*i*), and for that purpose, if necessary, to "open" the foreclosure, *i.e.*, to assert his right to redeem his estate, notwith-

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(*a*) For form, see Dav. Conc. Prec. 207, 210; 2 K. & E. 42, 45.

(*b*) 23 & 24 Vict. c. 145, pt. ii.

(*c*) 44 & 45 Vict. c. 41, ss. 19 and 23.

(*d*) See 32 Sol. Journ. 717.

(*e*) Fisher, 309; and see 958.

(*f*) *Cockell* v. *Bacon*, 16 Bea. 159.

(*g*) As to form of decree, see *Hunter* v. *Myatt*, 28 Ch. D. 181. As to the effect of a judgment upon the covenant to pay interest, see *Ex parte Fewings*, 25 Ch. D. 338.

(*h*) *Tawell* v. *Slate Co.*, 3 Ch. D. 629; *Wood* v. *Wheater*, 22 Ch. D. 281; and *Hoar* v. *Loe*, W. N. 1884, 241.

(*i*) *Kinnaird* v. *Trollope*, 39 Ch. D. 636.

standing the foreclosure. Thus, where, having obtained foreclosure, the mortgagee does not sell but sues on the covenant, he thereby opens the foreclosure; and if, after foreclosure, he sells (not under his power of sale, for that is extinguished by the foreclosure, but as owner) he cannot then maintain an action on the covenant, because, having sold the property, he has deprived himself of the power of restoring it to the mortgagor on being paid off (*k*). But, if the mortgagee, instead of foreclosing, sells the mortgaged property under his power of sale, or obtains a sale by the Court in lieu of foreclosure, he can sue the mortgagor personally for any deficiency (*l*).

Descent or devolution of equity of redemption.

The equity of redemption is considered in equity not as a mere right but as an estate in the land (*m*), and therefore alienable by the mortgagor; and it will descend on his death to his devisee or heir, according as he dies testate or intestate. In other words, the mortgagor is deemed the owner as before, subject only to the charge; the debt being a personal debt, for which the land is a security. Accordingly it was held that, on the death of the mortgagor, the debt was payable (as between persons claiming under the mortgagor) in the first instance out of the personal estate of the mortgagor, and (as between such persons) the land could only be resorted to if the personal estate was not sufficient to pay.

Locke-King's Act, &c.

This, however, was altered by the statute, commonly called Locke-King's Act (*n*), as regards persons claiming under a will, deed, or document made after the 31st December, 1854 (*o*). By that Act it is enacted that the heir or devisee of the land shall not be entitled to have the debt discharged out of the personal estate or other real estate (*p*) of the deceased (mortgagor); but, that as between the different persons claiming under or through the deceased, the land is to be primarily liable to the payment of all mortgage debts with which the same shall be charged, unless by his will or deed, or other document, the deceased has signified any contrary or other intention. There is a proviso that the Act is not to affect

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(*k*) *Perry* v. *Barker*, 8 Ves. 327a.; 13 Ves. 198; *Walker* v. *Jones*, L. R. 1 P. C. at p. 61; *Lockhart* v. *Hardy*, 9 Bea. 356. See 32 Sol. Journ. 717.

(*l*) Fisher on Mortgages, 957; *Willes* v. *Levitt*, 1 De G. & Sm. 392; *Rudge* v. *Richens*, L. R. 8 C. P. 358.

(*m*) 2 Spence, 642; 2 Cruise Dig. Tit. xv., Ch. III. p. 92; and per Lord Selborne, C., in *Heath* v. *Pugh*, 6 Q. B. D. 360, citing *Casborne* v. *Scarfe*, 1 Atk. 603; s.c. 2 W. & T.

(*n*) 17 & 18 Vict. c. 113.

(*o*) Observe that the Act does not apply where a will was *made* before 1855, although the testator die after 1854.

(*p*) *Re Newmarch*, 9 Ch. D. 12.

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or diminish any right of the mortgagee himself to obtain payment either out of the personal estate of the mortgagor or otherwise. In cases to which the Act applies, therefore, if a mortgagee has enforced payment out of the personal estate, the persons entitled to the personal estate have a right to be recouped out of the mortgaged real estate.

"Contrary intention"—how signified.

A general direction by a testator in his will 'that his debts were to be paid' or 'to be paid out of his estate,' was held not to be an expression of a contrary intention within the meaning of the Act; but a direction that they should be paid 'out of his personal estate,' or 'out of his residuary real and personal estate,' was a sufficient declaration of a contrary intention to enable the devisee to take the mortgaged land discharged of the debt (*q*). In consequence of these decisions, an Amending Act was passed (*r*), by which it is enacted that in the construction of the will of any person dying after 31st December, 1867, a general direction for payment of debts out of the personal estate shall not be deemed to be a declaration of intention contrary to or other than the rule established by the former Act, unless such contrary or other intention shall be further declared by words expressly, or by necessary implication, referring to all or some of the testator's debts charged by way of mortgage on any part of his real estate (*s*).

Vendor's lien.

It is further provided that in the former Act and the amending Act the word "mortgage" shall extend to any lien for unpaid purchase-money upon lands purchased "by a testator." It will be observed that the latter Act speaks only of a general direction for payment of debts out of personal estate; also that the word "mortgage" is made to extend to a lien for unpaid purchase-money only in respect of lands purchased "by a testator," omitting the case of the purchaser having died intestate; also that in the original or principal Act the heir and devisee alone are mentioned, and therefore a mortgage of leaseholds (which, being personalty do not descend to the heir or devisee, but devolve on the personal representative) was not included; and the second Act made no difference in this respect (*t*). To supply these omis-

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(*q*) See *Stone* v. *Parker*, 1 Dr. & Sm. 212.

(*r*) 30 & 31 Vict. c. 69.

(*s*) As to the expression of a contrary intention, see *Re Fleck, Colston* v. *Roberts*, 37 Ch. D. 677; and see *Re Smith, Hannington* v. *True*, 33 Ch. D. 195.

(*t*) *In re Wormsley's Estate*, 4 Ch. D. 665.

sions a third statute (*u*) was passed extending the application of the two previous Acts to "a testator or intestate dying after the 31st December, 1877, seised or possessed of or entitled to any land or other hereditaments of whatever tenure" at the time of his death charged with payment of money by way of mortgage, or any other equitable charge, including any lien for unpaid purchase-money. Thus the rule established by Locke-King's Act was made to apply to leaseholds (*x*) as well as to freeholds, and to a lien for unpaid purchase-money in respect of lands purchased by an intestate, as well as those purchased by a man who had made his will. Further, the Act provided that "the devisee, or legatee, or heir," shall not be entitled to have the mortgage debt or other charge discharged out of any other estate of the deceased, unless (in the case of a testator) he shall have signified a contrary intention, which shall not be deemed to be signified "by a charge of, or direction for, payment of debts upon or out of residuary real and personal estate, or residuary real estate;" thus entirely getting rid of the idea that any general direction for payment of debts signified a contrary intention, and, in fact, recognising (at any rate as regards persons dying after 31st December, 1877) the explanation of a declaration of a contrary intention first given by Giffard, V.-C. (*y*), and subsequently followed by other judges (*z*)—namely, that it must be "a direction applying to his mortgage debts in such terms as distinctly and unmistakeably to refer to or describe them." It should be added that where real estate and personal estate are comprised in the same mortgage, the debt must be borne rateably by the real and personal estate subject thereto (*a*), to the value of their respective portions. And so in the case of different portions of a mortgaged estate being devised to different persons, the devisees must contribute accordingly (*b*).

Alienation of equity of redemption: 1. By mortgage.

We have said that the equity of redemption may be alienated by the mortgagor, and have treated of its descent on his death. We will now consider his alienation of it during his life—(1) by

(*u*) 40 & 41 Vict. c. 34. See the remarks of Kay, J. on these Acts in *Re Cockcroft*, 24 Ch. D. 94.

(*x*) *Re Kershaw*, 37 Ch. D. 674.

(*y*) *Nelson* v. *Page*, L. R. 7 Eq. 27.

(*z*) Jessel, M. R., in *Gall* v. *Fenwick*, 43 L. J. Ch. 178; and *Sackville* v. *Smyth*, *ib.* 494; Malins, V.-C., in *Lewis* v. *Lewis*, L. R. 13 Eq. 227; Jessel, M. R., in *Re Rossiter*, 13 Ch. D. 355.

(*a*) *Trestrail* v. *Mason*, 7 Ch. D. 655 (*per* Hall, V.-C.). And see *Leonino* v. *Leonino*, 10 Ch. D. 460.

(*b*) See *Re Newmarch*, 9 Ch. D. 13, and judgment of Jessel, M.R., giving a short epitome of these Acts.

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Statutory protection to *puisne* mortgagees.

way of mortgage; (2) by way of sale. It will have been understood that after a mortgage of the legal estate in the land there is nothing left to the mortgagor with which to deal except the equity of redemption. As a protection to subsequent, or, as they are often called, "puisne" mortgagees or incumbrancers, it has been provided by the Statute 4 & 5 Wm. & Mary, c. 16 (s. 2), that if a person shall further mortgage lands, a former mortgage being in force and not discharged, and not discover in writing to the second or other mortgagee the former mortgage or mortgages, the mortgagor shall have no relief or equity of redemption against such second or other mortgagees, and they shall take the land as against him freed from such equity, and as fully as if the mortgage had been an absolute purchase (*c*). Further, by the Acts known as Lord St. Leonards' Acts, 1859, 1860, any (seller or) mortgagor, or his solicitor, or agent, who conceals any instrument material to the title or any incumbrance from the (purchaser or) mortgagee (*d*), in order to induce him to accept the title, with intent to defraud, shall be guilty of a misdemeanor, and liable to fine or imprisonment, and also liable to an action for damages at the suit of the (purchaser or) mortgagee or those claiming under them (*e*). The Act of Wm. & Mary, however, takes away the right of redemption from the mortgagor only, but reserves the right of redemption of the subsequent mortgagees (if any) (*f*). The equity of redemption is, in fact, transferred to them absolutely. Thus, in cases to which the Act applies, a second or third mortgagee may redeem the estate from the prior incumbrancers by paying their debts; and, if there are no incumbrances subsequent to his own, he will become absolutely entitled to the land at law and equity.

Tacking.

In cases where there has been a first mortgage of the legal estate, followed by successive mortgages of the equity of redemption, we have to consider the position of the mortgagees *inter se*, a mortgage having been made to (say) a third mortgagee without notice of the second mortgage. The doctrine was laid down by Hale, C.B., and others, so long ago as 22 Car. II. (*g*), and still prevails, that a *puisne* mortgagee, who advanced his money without notice of a "mesne," that is, intermediate, incumbrance, may

(*c*) Fisher, s. 1184 *et seq.*

(*d*) Omitted by accident from earlier statute.

(*e*) 22 & 23 Vict. c. 35, ss. 24, 25; and 23 & 24 Vict. c. 38, s. 8.

(*f*) 4 & 5 Wm. & Mary, c. 16, s. 4.

(*g*) *Marsh* v. *Lee*, 1 W. & T. 659.

by tacking, *i.e.* purchasing the first incumbrance (being a mortgage of the legal estate), thereby protect his *puisne* mortgage against any person having a mortgage subsequent to the first incumbrance but prior to his own, though he purchased such first incumbrance after he had notice of the subsequent incumbrance.

Absence of notice, and getting in legal estate.

The conditions which must be satisfied in order to entitle the subsequent mortgagee to obtain priority by tacking over a prior equitable mortgage are (1) that he had no notice, whether actual or constructive, of such prior mortgage at the time when he took his own mortgage, and (2) that he has obtained the legal estate from the first mortgagee.

Notice at time of taking mortgage.

"It is not a question of what a man knows when he does that which will better or perfect his security, but what he knows at the time when he took his security and paid his money. The principle always has been this, that if a man, with ignorance of a previous incumbrance, takes a mortgage or makes a purchase, when he finds out the truth, he may take such steps as he can in order to protect his weak security or his weak purchase" (*h*).

"The crucial point as to notice is the time of parting with the money and taking the security. A person who, without any notice of the prior incumbrances, takes the security, is at liberty, notwithstanding subsequent notice, to perfect that security which he has taken" (*i*).

Lord Hardwicke thus explains the doctrine (*j*);—

"As to the equity of this Court, that a third incumbrancer, having taken his security or mortgage without notice of the second incumbrance, and then being *puisne*, taking in the first incumbrance, shall squeeze out and have satisfaction before the second, that equity is certainly established in general; and was so in *Marsh* v. *Lee* (*k*), by a very solemn determination by Lord Hale, who gave it the term of the creditor's *tabula in naufragio:* that is the leading case. Perhaps it might be going a good way at first; but it has been followed ever since, and I believe, was rightly settled only on this foundation, by the particular constitution of the law of this country. It could not happen in any other country but this: because the jurisdiction of law and equity is administered here in different courts, and creates different kinds of rights in estates; and therefore as Courts of Equity break in upon the common law, where necessity and conscience require it, still they allow superior force and strength to a legal title to estates; and therefore where there is a legal title and equity on one side, this Court never thought fit, that by reason of a prior equity against a man, who had a legal title, that

(*h*) *Per* Cotton, L. J., *Mutual Life Assurance Society* v. *Langley*, 32 Ch. D. 460, at p. 468. See also *Blackwood* v. *Chartered Bank of Australia*, L. R. 5 P. C. at 111; *Taylor* v. *Russell* [1891], 1 Ch. 8, at p. 27.

(*i*) *Per* Fry, L.J., 32 Ch. D. at p. 473.

(*j*) In *Wortley* v. *Birkhead*, 2 Ves. Sen. 573.

(*k*) 2 Ventr. 337; S. C. 1 W. & T.

man should be hurt, and this by reason of that force this Court necessarily and rightly allows to the common law and to legal titles. But if this had happened in any other country, it could never have made a question; for if the law and equity are administered by the same jurisdiction, the rule, *qui prior est tempore potior est jure*, must hold. This has gone so far (and the original case was), that if a puisne incumbrancer took in the first incumbrance *pendente lite*, still he should have the same benefit; for in *Marsh* v. *Lee* there was a *lis pendens*, yet was not the party affected with it; and so, I take it, in general it would be, notwithstanding a *lis pendens;* because the principle upon which all these cases depend is this, that a man's having notice of a second incumbrance at the time of taking in the first does not hurt; it is the very occasion that shows the necessity of it. It is only notice at the time of taking in the third that will affect him; for then, no act he can do will help him. Then a *lis pendens* is nothing but notice: an actual notice is certainly as good as that by a *lis pendens;* one notice is in consideration of this Court as strong as another. Nay, actual notice is stronger than that implied by a *lis pendens;* it will not, therefore, affect him. That was *Marsh* v. *Lee* and the other cases, which I agree to. But no case is cited wherein a puisne incumbrancer, a party in a cause, and a decree made in that cause for satisfaction of incumbrancers according to their respective priorities, has taken in a prior to tack to his puisne incumbrance, that he shall be allowed to make use of that in any other shape than that original incumbrancer would be. I am of the same opinion as Lord Cowper was in *The Earl of Bristol* v. *Hungerford* (2 Vern. 524), in general, and do think it would be most mischievous and pernicious if the Court should allow that doctrine of tacking to be carried to that extent."

The mortgagee who purchases the first incumbrance, is said to "tack" it on to his puisne incumbrance (*l*) The second mortgagee, though he give notice of his advance to the first, cannot prevent the third from tacking if the latter advanced his money and took his security without notice of the second mortgage (*m*).

This want of notice (*n*) is the sole equity which places the subsequent mortgagee on an equal footing with the prior equitable mortgagee; and obtaining the legal estate from the first mortgagee gives him the priority. In like manner, if the first mortgagee, having the legal estate, make a further advance without notice of a second mortgage, the second mortgagee cannot redeem the first mortgagee without paying off his further advance as well as his original loan (*o*). It was formerly held, that, where the original mortgage was expressly made a security for further advances, and

(*l*) Elph. Introd. 198.

(*m*) *Peacock* v. *Burt*, 4 L. J. (N. S.), Ch. 35; and *Wortley* v. *Birkhead*, 2 Ves. Sen. 571, note.

(*n*) *Marsh* v. *Lee*, 1 W. & T. 659.

(*o*) *Per* Lord Hardwicke, *Morret* v. *Paske*, 2 Atk. 53; Fisher, 560; *Wyllie* v. *Pollen*, 11 W. R. 1081.

a second mortgagee lent his money with notice of this, the first mortgagee might tack his further advances made subsequently to the second mortgage, though he had notice of it; but this doctrine has been overruled, and it is now settled that, if the first mortgagee make a further advance with notice of the mesne incumbrance, he will not be entitled to priority in respect of such further advance (*p*).

2. Sale of equity of redemption.

The doctrine of *Toulmin* v. *Steere*.

It remains to consider the effect of a sale of the equity of redemption by the mortgagor. The purchaser, unless he be a mortgagee, or pay off a mortgage out of the purchase-money, acquires the right to redeem as against the mortgagee; but he does not incur any personal liability to the mortgagee, though, as between himself and the mortgagor, he must indemnify the latter against his personal liability to the mortgagee (*q*). For the sale of the equity of redemption to a stranger does not affect the rights and liabilities of the mortgagor and mortgagee *inter se*. The mortgagee can still sue the mortgagor on his covenant, and, if paid off by the mortgagor, must reconvey to him (*r*). But, in such a case, as the mortgagor has parted with his beneficial interest in the property, he requires the legal estate only for the purpose of compelling the owner of the equity of redemption to repay the money paid to the mortgagee: and accordingly the reconveyance by the mortgagee in such cases should not be in form absolute, but subject to the equity of redemption vested in any person other than the mortgagor (*s*). But, if the purchaser of the equity of redemption be a mortgagee, or in the position of one by payment off of a mortgage, he cannot set up the mortgage so paid off against any of the subsequent incumbrances of which he had notice, unless the paid-off mortgage is kept on foot, either by an express assignment of it in trust for the purchaser, or by some expression of an intention that it shall continue to subsist (*t*); such, at least, is the present doctrine, but it has been doubted, and would not, it seems, be extended.

Keeping on foot of paid-off mortgage.

(*p*) *Hopkinson* v. *Rolt*, 9 H. L. C. 514; *Bradford Banking Co.* v. *Briggs*, 12 App. Cas. 29; Fisher on Mortgages, 570; note to *Marsh* v. *Lee*, 1 W. & T. (6th ed.), at p. 714. As to what amounts to notice, see *post*, p. 283; *Saffron Walden Building Society* v. *Rayner*, 10 Ch. D. 696; and the Conveyancing Act, 1882 (45 & 46 Vict. c. 39), s. 3.

(*q*) *Waring* v. *Ward*, 7 Ves. at p. 337.

(*r*) *Palmer* v. *Hendrie*, 27 Beav. 349; 28 Beav. 341.

(*s*) *Pearce* v. *Morris*, L. R. 5 Ch. 227; *Kinnaird* v. *Trollope*, 39 Ch. D. 636.

(*t*) *Toulmin* v. *Steere*, 3 Mer. 210, notes to *Marsh* v. *Lee*, 1 W. & T. L. Ca. 678. And see *per* James, L.J., in *Adams* v. *Angell*, 5 Ch. D. 647.

The facts in *Toulmin* v. *Steere* (*r*) were as follows:—

The property in question belonged to Witts, subject to a mortgage in fee to Harrison. In 1805 Ann Simpson purchased an annuity secured on the estate, she having notice of the mortgage. In 1806, Witts further mortgaged to Wilby, who paid off the mortgage to Harrison, and took a transfer to himself. Trustees (with sanction of the Court of Chancery) bought the property from Witts, paid Wilby both mortgage debts, and he joined in the conveyance. The trustees purchased with constructive notice of the annuity, but it did not appear whether Wilby had, at the time of his loan, any notice of it. It was held that the trustees could not set up the mortgage as a subsisting charge in priority to the annuity.

In the recent case of *Adams* v. *Angell* (*s*), Jessel, M.R. (in the Court of Appeal), said:—

"Assuming *Toulmin* v. *Steere* to be binding upon us, it amounts to no more than this, that in the case of a purchase from the owner of an equity of redemption, in which the purchase-money is partly applied in paying off incumbrances, the purchaser with notice, whether actual or constructive, of other incumbrances, is not, *in the absence of any contemporaneous expression of intention*, entitled as against the other incumbrancers, of whose securities he has notice, to say afterwards that the incumbrances so paid off are not extinguished. It does not go beyond that; and there are several authorities which say that this doctrine is not to be carried further. Now in a Court of Equity it has always been held that the mere fact of a charge having been paid off, does not decide the question whether it is extinguished. If a charge is paid off by a tenant for life, without any expression of his intention, it is well established that he retains the benefit of it against the inheritance. Although he has not declared his intention of keeping it alive, it is presumed that his intention was to keep it alive, because it is manifestly for his benefit. On the other hand, when the owner of an estate in fee or in tail pays off a charge, the presumption is the other way; but in either case the person paying off the charge can, by expressly declaring his intention, either keep it alive or destroy it. If there is no reason for keeping it alive, then, especially in the case of an owner in fee, equity will, in the absence of any declaration of his intention, destroy it; but if there is any reason for keeping it alive, such as the existence of another incumbrance, equity will not destroy it. So, in the case of a purchase, there is no doubt that the purchaser who pays off a charge, though merely equitable, may have it assigned to a trustee for himself, and it will protect him against mesne incumbrances if there are any. So, also, it is admitted, that if without going through the ceremony of the assignment of an equitable charge—an assignment which really passes nothing—a declaration is inserted in the deed that

(*r*) 3 Mer. 210. See also the notes to *Forbes* v. *Moffatt* (18 Ves. 384), in Tud. L. C. R. P. 943 *et seq.*

(*s*) 5 Ch. D. 634.

the charge shall be treated as remaining on foot for the purpose of protecting the purchaser against mesne incumbrances, then the charge is treated as remaining on foot, and protects him. The intention, therefore, if expressed, governs the case; but if no intention is expressed, then *Toulmin* v. *Steere* says, that the incumbrance which is paid off is merged, and the subsequent incumbrancers let in."

The facts in the case of *Adams* v. *Angell* (*t*) were as follows:—

After a decree in a foreclosure suit to which both the mortgagor and the first and second mortgagees were parties, the plaintiff, the first mortgagee, purchased the equity of redemption from the trustee in bankruptcy of the mortgagor, and by the deed of assignment, in consideration of £1,380 (the sum due on the first mortgage) retained by the first mortgagee, "in full satisfaction of his debt, and of £20 paid to the trustee," (making the purchase-money of £1,400), the trustee assigned the mortgaged property to the first mortgagee, "subject to the aforesaid claim" of the second mortgagee. The value of the mortgaged property did not exceed £1,380. The second mortgagee contended that the effect of this purchase was to extinguish the first mortgage debt, and to let in his own charge as a first incumbrance. It was held by the Court of Appeal (affirming the decision of Hall, V.-C.), that looking at the circumstances, the conveyance sufficiently expressed an intention to keep the first mortgage alive; and that *Toulmin* v. *Steere* did not apply.

It appears from the statement of Jessel, M.R., that, notwithstanding the doctrine laid down by *Toulmin* v. *Steere*, a prior mortgage, though paid off, may, if the intention to keep it on foot is sufficiently expressed, be used by the purchaser of the equity of redemption, as a protection against the intervening incumbrances (*u*). Two forms for keeping the mortgage on foot where the purchaser has paid off a mortgage debt out of the purchase-money are in use, exemplifying the cases referred to by Jessel, M.R. —the one being an assignment of the debt and conveyance of the freehold to a trustee for the purchaser, the other a mere declaration that it is intended to keep the mortgage alive (*v*).

Consolidation (*x*).

There is another doctrine relating to redemption, which may affect a purchaser or mortgagee (*y*) of an equity of redemption;

(*t*) 5 Ch. D. 634.

(*u*) *Marsh* v. *Lee*, 1 W. & T. 678. See the remarks in Dart, V. & P. 1040, 1041.

(*v*) 2 Dav. pt. i., 326, 333.

(*x*) Elph. Introd. 196; 2 Dav. pt. 2, 288.

(*y*) *Beevor* v. *Luck*, L. R. 4 Eq. 537.

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namely, that, if the owner of different estates mortgage them separately to the same person, for distinct debts, the mortgagee may insist that one security shall not be redeemed alone, upon the principle that, redemption being an equitable right, the person who redeems must on his part do equity towards the mortgagee and redeem him entirely: not taking one of his securities, and leaving him exposed to the risk of deficiency as to the other (*z*). This is called the right of consolidation—the right to unite securities given for several debts on different estates until payment of the aggregate amount of the debts secured. Therefore a second mortgagee, in addition to the risk of being squeezed out by tacking, is liable to the risk of being squeezed out by consolidation (*a*).

The right to consolidate may be enforced not only in an action for redemption, but also in an action for foreclosure, and even in case of a sale under the power of sale in one of the mortgages (*b*), and whether the mortgage in respect whereof the right is claimed is legal or equitable (*c*).

Notice immaterial.

It will be remembered that notice of mesne incumbrances is fatal to tacking; but it has been held that as regards the right of consolidation the notice of a subsequent incumbrance is immaterial (*d*). Also the doctrine has been held to apply to a transferee of two mortgages on different estates though originally mortgaged to different persons, on the ground expressed by Knight-Bruce, L.J., that—

> "The second incumbrancer must be deemed to have taken his security with knowledge that the two mortgages on the two estates, though then belonging to different mortgagees, might coalesce, and with knowledge of the possible consequences of their coalition" (*e*).

"There may," he adds, "be moral considerations of weight against this conclusion, but it is settled by authority."

But it has been recently decided that the doctrine does not apply to a case where one of the mortgages was created subsequently to the assignment of the equity of redemption of the other mortgage to the person seeking to redeem (*f*).

(*z*) Fisher, 597.
(*a*) See 2 Da. ii. 293, note.
(*b*) *Selby* v. *Pomfret*, 3 De G. F. & J. 595.
(*c*) *Neve* v. *Pennell*, 2 H. & M. 170.
(*d*) *Vint* v. *Padget*, 2 De G. & J. 613.
(*e*) *Ibid.*
(*f*) *Mills* v. *Jennings*, 13 Ch. D. 639, S. C., sub nom. *Jennings* v. *Jordan*, affirmed by H. of L., 6 App. Cas. 698, overruling *Tassell* v. *Smith*, 2 De G. & J. 713; and see *Harter* v. *Colman*, 19 Ch. D. 630, in which case it was held

The doctrine is thus clearly and fully stated by Cotton, L.J. (g):—

"The rule as to consolidation of mortgages in its simplest form is this, that where one person has vested in himself by way of mortgage two estates, the property of the same mortgagor, one of these cannot be redeemed without the other; and this is so whether the two mortgages were originally granted to the same mortgagee, or, having been originally vested in different persons, have by assignment become vested in the same person. This was on the equitable principle that a Court of Equity would not assist a mortgagor in getting back one of his estates, unless he paid all that was due, though secured on a different estate. The mortgagor was coming into a Court of Equity to obtain its assistance in getting back an estate which at law belonged to the mortgagee, and it was held to be inequitable to allow him to get back an estate of more value than the debt charged on it, and to leave the mortgagee with an estate charged with a debt due by the mortgagor which might be of larger amount than the value of the estate. But even the rule in this its simplest form was doubted by Lord Hardwicke in the year 1750, as appears by the report of *Ex parte King* (1 Atk. 300), though he afterwards recognised and adopted it. Moreover, as a mortgagor cannot be allowed to prejudice the rights of his mortgagee by any dealings with the equity of redemption of the estate in mortgage, it has been held that a purchaser or mortgagee of one of two estates already in mortgage is, as regards the consolidation of the mortgages, in the same position as the original mortgagor—that is to say, the purchaser of an equity takes subject to all the equities affecting the person through whom he claims. It is in this case contended that this will apply, even though one of the mortgages which it is sought to consolidate was not created till after the mortgagor had sold the equity of redemption of the estate owned by the person claiming to redeem. In our opinion, independently of authority, this contention cannot prevail. It seeks to affect in equity, and by virtue of a rule the creation of equity, the right of a purchaser by the subsequent act of his vendor. That this will be the result will appear from considering from what acts of the purchaser the right of consolidation arises. It is the circumstance of the mortgagor having created two mortgages on two different estates which gives the mortgagee of either estate, as soon as the second mortgage is created, a right to get both the mortgages into his hands, and to hold both till the debt due on each is paid. The principle which allows, as against a subsequent purchaser or mortgagee, the right of consolidation is, that the mortgagor cannot, by any dealing with the equity of redemption, prejudice the rights of his mortgagee. This can only apply to rights already given or arising from acts already done by the mortgagor. The same principle will prevent the mortgagor from throwing a greater burden on the purchaser of his equity of redemption by any act done subsequently to the sale or mortgage of this estate. It is true that a mortgagee of one estate

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that there was no right of consolidation where two mortgages became united in one person for the first time after the mortgagor had assigned the equity of redemption in one of them.

(g) *Mills* v. *Jennings*, 13 Ch. D. 639, at p. 646.

may get in and consolidate the mortgage on another estate against a purchaser of the equity of redemption of one of the estates, even though at the time of the purchase the two mortgages were vested in different persons, provided both the mortgages existed previously to the sale of the equity of redemption of one of the estates. But this equity arises out of acts done by the vendor of the equity of redemption previously to the sale; and the act after the sale necessary to give effect to the right of consolidation—namely, the union of the mortgages on both estates in one person—is an act of persons who are no parties to the sale of the equity of redemption, and not bound to the purchaser by any contract inconsistent with the claim to consolidate. In our opinion the purchaser of an equity of redemption takes subject to such equities as arise from acts previously done by his vendor. He is subject to these equities, though acts of persons other than the vendor may be necessary to give rise to the equity. But in our opinion he is not subject to any equity arising from acts done by his vendor subsequently to the sale, and therefore as against a purchaser of an equity of redemption of an estate, there can be no consolidation of a mortgage subsequently created on another estate."

Again, it has also been recently held, that the doctrine does not apply unless default has been made on all the securities in respect of which it is claimed (*h*). Cotton, L.J., says:—

"In order to enable the mortgagee to bring an action, and to consolidate, there must be two debts due, there must be two estates in respect of which there is only an equitable right in the debtor to redeem or claim them back; and that cannot apply to a case where, as regards one of the securities, there has been no forfeiture at all, where the debt is not due, and where, as regards that estate and that security—an independent security—steps could not be taken as against the owner of the equity of redemption to bring him into Court, and to call upon him to redeem or to be foreclosed. It cannot apply to a case where the stipulation is that certain monthly payments are to be made, and there has been no default, and the contract goes on to say that if those payments are all made, then the estate shall revest, there having been no forfeiture so as to make the right of the owner of the estate subject to the security an equitable one only, not depending upon legal contract."

"The principle of the doctrine," it has been said (*i*), "is that a person who comes into equity must do equity;" and if the mortgagor comes to redeem within the time limited by the deed for payment, *i.e.*, while he has still a *legal* right to redeem, the equitable doctrine has no application; but if he has allowed that time to pass and has no legal rights, then the equitable doctrine applies (*ii*).

(*h*) *Cummins* v. *Fletcher*, 14 Ch. D. 699. And see 2 Da. ii. 290.

(*i*) Per Lindley, J., *Chesworth* v. *Hunt*, 5 C. P. D. at p. 271.

(*ii*) *Ibid.*

In order to maintain a right to consolidate, the mortgagee must be able on redemption to reconvey both properties: and therefore there can be no consolidation where one property has ceased to exist (*j*).

By the above and other decisions, the application of the doctrine of consolidation has been considerably cut down; and now by the Conveyancing and Law of Property Act, 1881 (*k*), it is enacted that where the mortgages, or one of them, are or is made after the 31st December, 1881, a mortgagor (*l*) seeking to redeem any one mortgage shall be entitled to do so, without paying any money due under any separate mortgage made by him, or by any person through whom he claims, on property other than that comprised in the mortgage which he seeks to redeem. But this enactment applies only if, and so far as, a contrary intention is not expressed in the mortgage deeds or one of them. So that in future, in respect of mortgages made after the commencement of the above Act—*i.e.*, 31st December, 1881, the right to consolidation can only arise under express contract.

Implied covenants for title.

In addition to the shortening of mortgage deeds effected by the Conveyancing and Law of Property Act, 1881, by making incident to the estate of the mortgagee a power of sale, and other powers hitherto usually inserted in the deed, as above pointed out, the covenants for title by the mortgagor may in future be omitted, the same Act causing them to be implied where the mortgagor conveys and is expressed to convey "as beneficial owner" (*m*). These are absolute covenants (*n*) that he has a right to convey, that the mortgagee shall have quiet enjoyment of the property after default (*o*), free from incumbrances, and for further or more perfectly assuring the subject-matter of conveyance. The Legislature has further, by the same Act (*p*), provided short forms of

Statutory forms.

(*j*) *In re Raggett*, 16 Ch. D. 117, where there were two mortgages of leaseholds, and the lessors afterwards reentered on one of the properties for a forfeiture upon the bankruptcy of the mortgagors.

(*k*) 44 & 45 Vict. c. 41, s. 17.

(*l*) "Mortgagor" includes any person from time to time deriving title under the original mortgagor, or entitled to redeem a mortgage, according to his estate, interest, or right in the mortgaged property (44 & 45 Vict. c. 41, s. 2, (vi.)).

(*m*) 44 & 45 Vict. c. 41, s. 7 (1) (c).

(*n*) That is to say, that, while in conveyances upon sales the covenants are restricted to the acts and omissions of the vendor, and the ancestors and testators through whom he claims, the covenants in mortgage deeds and securities for money are unrestricted, and amount to a warranty against and for the acts and omissions of the whole world (1 Da. p. 121). See, as to covenants for title, *post* p. 356.

(*o*) See *ante*, p. 190.

(*p*) 44 & 45 Vict. c. 41, s. 26 to 29.

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deeds of statutory mortgage, statutory transfer, and statutory reconveyance (*q*).

Reconveyance.

Upon the debt being satisfied, whether by payment after notice or after action upon the covenant in the deed to pay the debt, or by payment in an action for foreclosure, or in an action for redemption, or by payment into Court for discharge of incumbrances on a sale under the power, above referred to, given by the Conveyancing and Law of Property Act, 1881 (*r*), a mortgagor is entitled to have reconveyed to him, or as he may direct, the mortgaged property. Before 1882 the mortgagee was not, in the absence of an express provision (which was usually inserted) (*s*) obliged to assign (*t*) the mortgage debt to the mortgagor upon redemption; or to a purchaser, when the security is paid off out of the proceeds of a sale under a decree; nor was he bound to convey to any other person as a mortgagee in his own place (*u*); being bound only to reconvey the estate to the owner of the equity of redemption. But after 1881, by the Conveyancing and Law of Property Act, 1881 (*x*), a mortgagor entitled to redeem, may, notwithstanding any stipulation to the contrary, require the mortgagee to assign the mortgage debt, and convey the mortgaged property to any third person as the mortgagor directs.

Right of mortgagor to require mortgagee to transfer.

The extent and meaning of this provision was explained in *Teevan* v. *Smith* (*y*), by Jessel, M.R., as follows:—

"When we come to look at the section, it appears to me quite plain what the meaning of it is. We must remember what the law was before that Act was passed. A mortgagor had only a right to redeem and to have a reconveyance on payment of the mortgage debt. Hence a difficulty arose, for lenders were willing to advance money if they could have a transfer of the mortgage security, but were not willing to take a security directly from the mortgagor, dreading intermediate incumbrances. At that time the debt was not transferable, so that a power of attorney was necessary; therefore, the old decisions were right in laying down that a mortgagee was not to be required to run the risk of being made liable to costs, which he might be, if he transferred the debt to a third person. Now the difficulty has been got rid of, by making the debt transferable at law, so that no power of attorney is required, and all ground of objection on the part of a mortgagee to transfer the security is taken away. It can do him no harm in any way.

"Then, what are the words of the 15th section of the Act of 1881?

(*q*) See 3rd schedule.

(*r*) 44 & 45 Vict. c. 41, s. 15.

(*s*) Elph. Introd. 138.

(*t*) *Dunstan* v. *Patterson*, 2 Ph. 341; and Fisher, 962.

(*u*) *James* v. *Biou*, 3 Swanst. at 241; *Colyer* v. *Colyer*, 3 De G. J. & S. 676, per Turner, L.J., at 693.

(*x*) 44 & 45 Vict. c. 41, s. 15.

(*y*) *Teevan* v. *Smith*, 20 Ch. D. 728.

It says, 'where a mortgagor is entitled to redeem.' Every mortgagor is entitled to redeem, but there is a difference in their rights. Where there is one mortgagor and one mortgagee, there, of course, his right to redeem is absolute. But where there are several successive mortgagees the mortgagor can redeem the next to him without redeeming any other; but if he wishes to redeem any anterior mortgage he must also redeem all who are between that mortgagee and himself. A puisne mortgagee, indeed, is in rather a worse position than this; for, although he is entitled to redeem those above him, he cannot do so without foreclosing those between himself and the ultimate equity of redemption. So that the words, 'where a mortgagor is entitled to redeem,' really include every mortgagor, except a mortgagor who is precluded by some special term in his mortgage deed from redeeming within a specific time. For although the law will not allow a mortgagor to be precluded from redeeming altogether, yet he may be precluded from redeeming for a fixed period, such as five or seven years. That is why the words 'where a mortgagor is entitled to redeem,' are inserted. They mean where a mortgagor is not precluded from redeeming for a certain time by some special stipulation. Then it says, 'he shall have power to require the mortgagee, instead of reconveying, and on the terms on which he would be bound to reconvey, to assign the mortgage debt and convey the mortgaged property to any third person.' It is only 'instead of reconveying.' The section assumes two things: First, that the mortgagee is bound to reconvey to the person applying to him; and, secondly, that the transfer is to be instead of a reconveyance. Then see how it works. Where there are first and second mortgagees, and the first mortgagee has notice of the second, when he is paid off he becomes a trustee of the legal estate for him. The word 'reconvey' is the proper word to use; it is strictly a reconveyance. If the first mortgagee is paid off by the mortgagor, he is not bound to reconvey the estate to him; but if he is paid off by the second mortgagee, he is bound to reconvey it to him. The second mortgagee is a mortgagor under the definition in the Act (*z*). He is an assign of the mortgagor, and is entitled to redeem. It appears to me that no person can avail himself of the 15th section who is not entitled to call for a reconveyance of the estate from the mortgagee. The Act never intended to effect any change in the person who was entitled to call for a reconveyance."

Subsequently, the above right given to the mortgagor by the Act of 1881, has been extended by the Conveyancing Act, 1882 (*a*), so that it may be enforced by each incumbrancer, or by the mortgagor, notwithstanding any intermediate incumbrance; but a requisition to assign the debt and convey the property by an incumbrancer is to prevail over a requisition by the mortgagor, and as between incumbrancers a requisition of a prior incumbrancer is to prevail over a requisition of a subsequent incumbrancer.

(*z*) S. 2.

(*a*) 45 & 46 Vict. c. 39, s. 12.

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The above provisions do not apply in the case of a mortgagee being or having been in possession; for, it is said, he is liable to account, and the mortgagor cannot release his liability to mesne incumbrancers (*b*).

Devolution of mortgage estate on death of mortgagee.

Formerly, if the debt was repaid after the death of the mortgagee, it was necessary that the property mortgaged should be reconveyed by the devisee, where the mortgagee had by his will devised his mortgage estates, or, if he died intestate as to such estates, then by his heir. But as expense and inconvenience not unfrequently arose from the heir being unable, by reason of infancy or otherwise, to convey, or not being ascertainable (*c*), a partial remedy was applied by the Vendor and Purchaser Act, 1874 (*d*), which empowered the legal personal representative of a mortgagee of a freehold estate (or of a copyhold estate to which the mortgagee had been admitted), on payment of all sums secured by the mortgage (*e*), to convey (or surrender) the mortgaged estate. This section, in the case of mortgagees dying after the 31st December, 1881, is repealed by the Conveyancing and Law of Property Act, 1881 (*f*); but such repeal is not to affect the validity or invalidity, or any operation, effect, or consequence of any instrument executed or made, or of any thing done or suffered before the 31st December, 1881 (*g*). By that Act (*h*), on the death of the mortgagee, notwithstanding any testamentary disposition, the estate is made to vest in his personal representatives or representative from time to time in like manner as if it were a chattel real vesting in them or him. The result is, that for the future a mortgagee's estate must go to his personal representatives or representative, and if he wishes it to go to a particular person, that can only be effected by appointing him an executor for that special purpose (*i*). This section has been repealed by the Copyhold Act, 1887, so far as regards copyholds vested in the tenant on the Court Rolls of any manor by way of mortgage (*j*).

Mortgages of leaseholds.

In mortgages of leaseholds, in order to save the mortgagee from the liability which he would incur in respect of the rent and

(*b*) 44 & 45 Vict. c. 41, s. 15 (2). See note by Wolstenholme & Turner, p. 52.

(*c*) 2 Da. pt. ii. p. 37.

(*d*) 37 & 38 Vict. c. 78, s. 4.

(*e*) *In re Spradbury's Mortgage*, 14 Ch. D. 514.

(*f*) 44 & 45 Vict. c. 41, s. 30.

(*g*) S. 71 (2).

(*h*) S. 30.

(*i*) Wolstenholme & Turner, p. 76.

(*j*) 50 & 51 Vict. c. 73, s. 45. See *Re Mills*, 37 Ch. D. 312; 40 Ch. D. 14, *ante*, p. 192, note (*d*).

covenants as assignee of the lease, the mortgage is usually made by demise, and thereby the mortgagee becomes tenant of the mortgagor and not of the lessor. The mortgagor demises the property to the mortgagee, his executors, administrators, and assigns, for the residue of the term, except the last day or last few days thereof; and in the deed is contained a declaration of trust for the mortgagee of the last day (or last few days) of the term, or in the power of sale it is declared that after any sale the mortgagor shall stand possessed thereof in trust for the purchaser (*k*).

The Conveyancing and Law of Property Act, 1881 (*l*), has enacted (as we have seen) that, in a conveyance of leasehold property for valuable consideration, other than a mortgage, where the person who conveys is expressed to convey "as beneficial owner," certain covenants (commonly called "covenants for title") shall be implied; it also enacts (*m*) that, in a conveyance by way of mortgage, corresponding covenants by the person who conveys and is expressed to convey "as beneficial owner" shall be implied, and also a further covenant to pay, observe, and perform all the rents reserved by, and all the covenants, conditions, and agreements in the lease on the part of the lessee to be paid, observed, and performed, and to keep the mortgagee indemnified against all claims by reason of their non-payment, or non-observance, or non-performance (*n*).

(*k*) See 2 Da. ii. 415; 2 K. & E. 81.
(*l*) 44 & 45 Vict. c. 41.
(*m*) S. 7 (1), C. and D.
(*n*) For Forms of mortgages of leaseholds, see Dav. Conc. Prec. 204; 2 K. & E. 80.

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CHAPTER VIII.

ESTATES IN POSSESSION.—ESTATES IN EXPECTANCY.

HAVING discussed the different classes of estates of freehold so far as regards the duration of interest in them, that is to say, whether for life, in tail, or in fee; having pointed out the distinction between freehold estates and those less than freehold, and between estates conditional and absolute; we proceed to consider the distinction between Estates in Possession and Estates in Expectancy.

An Estate in Possession is one conferring an immediate right to present enjoyment. An Estate in Expectancy is one conferring a right to enjoyment at a future time.

"Possession" is here used as meaning either the actual occupation of lands by the owner himself (*a*), or the receipt (sometimes called the "pernancy") of the rents and profits by him from occupying tenants (*b*). Where a person has a right to the immediate possession, but possession is wrongfully withheld from him, he may be regarded for most purposes as having still an estate in possession, though he may be obliged to have recourse to legal process in order to recover the actual possession of the lands (*c*). Strictly speaking, however, he has not seisin (even seisin in law) but only a right of entry (*d*); for the seisin is in the wrongful possessor, who becomes wrongfully entitled to an estate in fee simple (*e*).

I. Estates in possession.

An Estate in Possession requires little comment; it almost explains itself. Thus, if A., being an owner in fee simple in possession, grants his estate to B., or out of his fee grants an

(*a*) Lands in the actual occupation of the owner himself are commonly said to be "in hand;" see Elph. N. & C. Interp. (Glossary, s.v. *Demesne*), p. 570.

(*b*) See Co. Litt. 17*a*. Where A., being owner in fee simple, has demised to B. for a term of years, A. is properly described, not as having a reversion expectant on the term, but as "seised in fee simple subject to" the term.

(*c*) As to the meaning of "possession" see Pollock and Wright on Possession in the Common Law.

(*d*) Challis, R. P. 182.

(*e*) Williams on Seisin, p. 6, cited by James, L.J., in *Leach* v. *Jay*, 9 Ch. D. 42.

estate to B. for his life, B. acquires an estate in possession, in fee in the one case, and for life in the other. So, were he by his will to do the like, there being no intermediate gift to any other person, B., upon the death of the testator, would acquire an estate in possession.

II. Estates in expectancy.

Estates in Expectancy may be classified as—(1) estates in Reversion; (2) estates in Remainder; and (3) Executory Interests, which are created by (a) Executory devises in wills, or (b), "Springing" or "Shifting uses" in deeds. Executory devises and springing and shifting uses will be more easily explained after we have discussed the Statute of Uses; and this part of our subject is therefore reserved for a subsequent Chapter (*f*). It should, however, be here observed that an Executory Interest is, strictly speaking, not an "estate," but a right (which may be contingent) to have an estate at a future time.

a. Estates in reversion.

An estate in Reversion is that portion of the estate or ownership which, a partial interest having been created by an owner out of his estate, not exhaustive of his whole ownership, is left, as a residue undealt with, in himself; for instance, where a tenant in fee simple grants to another an estate for years, or for life, or in tail. That residue, the portion of the estate not dealt with, is a "reversion." The part carved out of the larger ownership is called a "particular" estate, from the Latin word *particula*, as being a part only of the whole ownership (*g*); and the estate left in the grantor is called a reversion, because, on the termination of the particular estate, the land reverts in possession to him.

Particular estate.

A reversion therefore arises where the owner does not part with his whole estate; for instance, where A., the owner in fee, grants an estate to B. for his life, but does not deal with the portion of the estate not exhausted by B.'s life interest; this portion remains in the grantor, and on the death of B. the land will revert to the grantor, or his heir or other successor in title.

The reversion is vested in him who was before the owner of the whole, *ipso facto* and without any special reservation for the purpose: and it is an estate in expectancy only, and not in possession, because the reversioner has no right to the possession until the particular estate has determined.

(*f*) *Post*, ch. x., p. 272.

(*g*) "At the common law, two particular estates only could be created by the act of the party, an estate for life, and an estate for years; the estate *De Donis* authorised him to create an estate tail; so the law has continued;" Fearne, C. R. p. 3, note (*c*).

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Particular estate. —freehold. —chattel interest.

A distinction should be noticed, in reference to seisin, between the case in which the particular estate is one of freehold and that in which it is merely a chattel interest. Where the particular estate is a freehold estate, whether for life or in tail, its holder has the actual seisin (*h*); and, as there cannot be two concurrent estates of freehold in severalty in possession in two different parties, the ulterior estate, which is to take effect in possession only on the termination of the particular estate, is necessarily of a reversionary character. Where, however, the particular estate is a chattel interest, that is, a term of years, though the ulterior interest is in a sense reversionary, inasmuch as the right to the immediate possession is postponed,—the reversioner remains seised of the immediate freehold. When the nature of a chattel interest is remembered, it will be obvious that the legal seisin has never been parted with, and that, subject to the lease, an estate in possession may be transmitted by the owner to another person; for the possession of the termor is regarded as in law the possession of the freeholder (*i*). Thus, to take the ordinary case of a lease for years at a rent, the landlord having demised for the term of the lease, the right to the actual possession of the lands is no doubt postponed to the expiration of the lease, and the interest of the lessor is so far reversionary. But the right to the rent becomes annexed to the ownership of the reversion; and the receipt of the rent is in fact only a mode of enjoyment by the reversioner of the present profits of the land.

Dower and curtesy.

The effect of this doctrine may be seen in reference to dower and curtesy, for it will be remembered that both these rights attach only the estates of which there is seisin during the coverture (*k*). Where the particular estate is a term of years, the owner of the reversion in fee remains seised of an estate of inheritance; and, therefore, if the reversioner be a man, his wife is dowable thereout; and if the reversioner be a woman, her husband may become tenant by the curtesy (*l*).

Alienation.

So also, where the particular estate is only a term of years, the reversion can, with the consent of the tenant for years, be conveyed by feoffment (*m*), which derives its efficacy from the

(*h*) Co. Litt. 17*a*, 200*b*, 201*a*.

(*i*) Challis, R. P. 181; *Ib.* 77; 1 Cruise, Dig. 224, ss. 10, 11, citing Bracton, who remarks that, in such a case, "*bene sese compatiuntur de eadem re duae possessiones.*"

(*k*) *Ante*, pp. 127, 133.

(*l*) Co. Litt. 29*b*, 32*a*.

(*m*) Co. Litt. 49*a*; Wms., R. P. 282. See, as to feoffments, *post*, ch. xiv., p. 351.

livery of seisin by the feoffor to the feoffee. On the other hand, where the particular estate is a freehold, the seisin being in the owner of the particular estate, the reversion is an incorporeal hereditament of which no livery can be made; and, therefore, the mode of conveying a reversion in such cases was always by grant. This difference is not now, for practical purposes, very material; for the Act 8 & 9 Vict. c. 106, provides that all corporeal tenements and hereditaments shall, as regards the immediate freehold thereof, be deemed to lie in grant as well as in livery (*n*). An estate in possession and an estate in reversion in the same land can exist as separate estates only so long as they belong to different owners, or, if the same person is owner of both, so long as some estate exists intermediate between the estate in possession and that in reversion. As respects all other estates than an estate tail, the union of the reversionary estate with that in possession causes a merger, and the latter becomes extinguished in the former (*o*). Thus, where the interest in possession, whether for a term of years or for life, has been granted to a man who subsequently acquires the reversion, the larger ownership of the reversion swallows up the smaller particular estate, which accordingly is annihilated. So, if the owner of an estate in fee simple grants an estate to his eldest son for his life, leaving the reversion in himself, and then dies intestate, whereupon the reversion descends upon the son, the estate for life merges in the reversion. Again, if the lessee for a term of years, acquires the fee by a devise or otherwise, the term merges in the fee. It must, however, be noticed that merger will not take place where the estates meet in the same party in different rights. Thus, in the case of a term, if it belong to a person in the character of executor of its former owner, while the fee belongs to him in his own right, there would be no merger (*p*).

Merger.

Merger is confined to cases in which the particular estate is one held either for life or for years. An estate tail does not merge in a remainder in tail nor in the remainder or reversion in fee: for estates tail are protected from merger by the construction which has been put on the Statute *De Donis*, enacting that the

(*n*) *Ante*, p. 83.

(*o*) As to merger, see *ante*, p. 153, and the definition of merger given at p. 154, note (*k*).

(*p*) See Challis, R. P. 71; Co. Litt. 338*b*; 6 Cruise, Dig. 479 (s. 51). And *Ib.*, title *Merger*, pp. 466 *et seq.*, as to other requisites to produce merger.

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will of the donor is to be fulfilled, which, it was assumed, could not be if the estate tail were thus destroyed. Says Blackstone (*q*):—

"Estates tail are protected and preserved from merger by the operation and construction, though not by the express words, of the Statute *De Donis*: which operation and construction have probably arisen upon this consideration; that, in the common cases of merger of estates for life or years by uniting with the inheritance, the particular tenant hath the sole interest in them, and hath full power at any time to defeat, destroy, or surrender them to him that hath the reversion; therefore, when such an estate unites with the reversion in fee, the law considers it in the light of a virtual surrender of the inferior estate. But, in an estate tail, the case is otherwise: the tenant for a long time had no power at all over it, so as to bar or destroy it: and now can only do it by certain special modes, by a fine, a recovery, and the like: it would, therefore, have been strangely improvident, to have permitted the tenant in tail, by purchasing the reversion in fee, to merge his particular estate, and defeat the inheritance of his issue: and hence it has become a maxim, that a tenancy in tail, which cannot be surrendered, cannot also be merged in the fee."

Incidents. Fealty. Rent.

From ancient times two incidents have been considered as annexed to a reversion,—"fealty," and, when reserved, rent called a "rent service" (*r*). The former has now become obsolete; but the latter sometimes exists; and whenever rent is reserved to the reversioner on the granting of a particular estate, the right to the rent, unless specially excepted, passes with a grant of the reversion itself. Thus, suppose A. to be the owner in reversion subject to a lease granted out of his estate, his reversion being the next estate immediately expectant on the lease itself; if he grant over to another the reversion, the right to the rent passes, with the estate itself, to the grantee. The rent is called "rent service," as it is the service rendered by the tenant to his lord (*s*); it usually, but not necessarily (*t*), consists of money, and sometimes it is a peppercorn merely (*u*).

(*q*) Vol. ii. 177; and see 6 Cruise, Dig. 481 (ss. 61; foll.); Challis, R. P. 72.

(*r*) "Rent service is where the tenant holdeth his land of his lord by fealty and certain rent, or by homage fealty and certain rent, or by other services and certain rent;" Litt. s. 213. That it must be certain, see Co. Litt. 142*a*.

(*s*) "It is called rent service because it is accompanied with some corporal service, as fealty at the least;" Co. Litt. 87*b*.

(*t*) 3 Cruise, Dig. 272; Gilbert on Rents, 9; J. W. Smith, L. & T. 119.

(*u*) 2 Bl. 41. See form of reservation of a peppercorn rent in 1 K. & E. 722. It is often employed in building leases in respect of the period during which the buildings are likely to be in course of erection: see Settled Land Act, 1882, s. 8 (2), which authorises such a reservation, in building leases granted under the Act, "for the first five years or any less part of the term."

At common law a rent service need not be reserved by deed (*x*); but now (as we have seen) a lease required by law to be in writing will be void if not by deed. By the Statute of Frauds (*y*) a lease must be in writing, except where it does not exceed three years, and a rent of at least two-thirds of the full value is reserved.

Though rent be incident to the reversion when existing, its creation is not a condition to the creation of the reversion itself. Thus, I may grant to one for years, for life, or in tail, without any reservation of rent at all. The estate would be good, and the reversionary interest as much preserved as though rent had been reserved. Says Lord Coke (*z*):—

"It is to be understood that in the case of the gift in tail, lease for life or years, the fealty is an incident inseparable to the reversion, so as the donor or lessor cannot grant the reversion over, and save to himself the fealty, or such like service. But the rent he may except; because the rent, although it be incident to the reversion, yet it is not inseparably incident. If a man maketh a gift in tail without any reservation, the donee shall hold of the donor by the same services that he held over. But otherwise it is of an estate for life or years; for there, if he reserveth nothing, he shall have fealty only, which is an incident inseparable to the reversion, as hath been said."

Attornment.

At common law, no grant could be made of the reversion carrying with it the right to the rent, without the consent of the tenant, expressed by what was called "attornment" to his new landlord. It was conceived unreasonable to impose a new landlord upon the tenant without his concurrence. Such at least was the case when the grant was made by an assurance of the ordinary character; though it was otherwise when it was effected by a fine, which, being treated as a judicial assurance, superseded the necessity for attornment. A statute of the reign of Queen Anne abolished the necessity for attornment (*a*); and by 11 Geo. II. c. 19, s. 11, any attornment made by tenants without their landlord's consent to strangers, claiming title to the estate of their landlords, is made null and void.

Distress.

Rent service issues out of every part of the land; in other words, every portion of the property is liable to it; and for recovery of all rent service there exists at common law (*b*) the remedy called "distress," which is a right of seizure of chattels (*c*)

(*x*) Litt. s. 214.

(*y*) 29 Car. II. c. 3. *Ante*, p. 142.

(*z*) Co. Litt. 143*a*.

(*a*) 4 Anne, c. 16, s. 9. See, as to attornment, *Moss* v. *Gallimore*, 1 Sm. L. C.; and *ante*, p. 162.

(*b*) Litt. s. 213.

(*c*) See as to what things can be distrained, Co. Litt. 47*a*, and note (*f*) on next page.

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found on any part of the premises. By statute, power has been given to a landlord to sell goods distrained (*d*) and to distrain goods fraudulently removed (*e*). By 34 & 35 Vict. c. 79, the goods of lodgers are protected (*f*).

Condition of re-entry.

Ordinary leases usually contain an express condition of re-entry on non-payment of the rent (*g*).

In ancient times conditions of re-entry, it will be remembered, were not assignable (*h*). They were treated as personal only to the landlord and his heirs. A statute of Henry VIII. (*i*), however, in the case of leases by deed (*k*), made them transferable. The Wills Act (*l*) enabled rights of entry for conditions broken to be disposed of by will, and the Act to Amend the Law of Real Property (*m*) enabled all rights of entry to be disposed of by deed.

The assignee of the reversion at common law had a right to distrain for rent, because the rent was incident to the reversion; but he could not avail himself of conditions of entry (*n*).

Destruction of reversion.

Formerly, if the reversion to which rent was incident was destroyed, the rent itself was extinguished, and could not be recovered. Thus, suppose A., having himself only a lease or term for years, were to let to B. for a term less than his own, reserving rent, and then the reversion on his own lease, for example, the fee, were to devolve on himself; A.'s term would have merged in the fee and become destroyed. But it was to that term only that the rent payable by B. was incident. Consequently, A.'s term having gone, the incident would perish with that to which it was annexed. After the merger the reversionary estate would not be the estate, viz., A.'s term, to which the rent

(*d*) 2 Wm. & Mary, c. 5, s. 2 (2 Wm. & Mary, Sess. 1, in Ruffhead).

(*e*) 8 Anne, c. 14: repealed, see now 11 Geo. II. c. 19, and *Gray* v. *Stait*, 11 Q. B. D. 668.

(*f*) See *Phillips* v. *Henson*, 3 C. P. D. 26; *Thwaites* v. *Wilding*, 12 Q. B. D. 4; and *Heawood* v. *Bone*, 13 Q. B. D. 179; J. W. Smith, L. & T. 224. And see the Law of Distress Amendment Act, 1888 (51 & 52 Vict. c. 21), exempting from distress for rent certain goods and chattels of the tenant and his family, viz., those which would be protected from seizure in execution under s. 147 of the County Courts Act, 1888 (51 & 52 Vict. c. 43), which are "the wearing apparel and bedding of such person or his family and the tools and implements of his trade to the value of £5."

(*g*) *Ante*, p. 164; Elph. Introd. p. 212.

(*h*) *Ante*, chap. vii., p. 183.

(*i*) 32 Hen. VIII. c. 34.

(*k*) *Standen* v. *Christmas*, 10 Q. B. 135. *Ante*, p. 162.

(*l*) 1 Vict. c. 26, s. 3.

(*m*) 8 & 9 Vict. c. 106, s. 6.

(*n*) *Scaltock* v. *Harston*, 1 C. P. D. 106; see *per* Archibald, J., p. 109; and *ante*, p. 184.

was incident; and so the rent would be lost. This was remedied in the case of leases surrendered for the purpose of renewal by the statute 4 Geo. II. c. 28, by which owners of new (renewed) leases were invested with the same rights to the rent of under-tenants, and the same remedies for its recovery, as if the original leases had been kept on foot. And the Act to Amend the Law of Real Property (*o*) extended the same remedy to other cases of merger or surrender. It enacts:—

> S. 9. "That when the reversion expectant on a lease, made either before or after the passing of this Act, of any tenements or hereditaments, of any tenure, shall after the said 1st day of October, 1845, be surrendered or merge (*p*), the estate which shall for the time being confer as against the tenant under the same lease the next vested right to the same tenements or hereditaments shall, to the extent and for the purpose of preserving such incidents to, and obligations on, the same reversion, as, but for the surrender or merger thereof, would have subsisted, be deemed the reversion expectant on the same lease."

Now by the Conveyancing and Law of Property Act, 1881 (*q*), every condition of re-entry and other condition contained in a lease made after 1881, is to go with the reversion immediately expectant on the term granted by the lease, and may be taken advantage of by the person entitled, subject to the term, to the land leased.

b. Estates in remainder.

How differing from reversions.

A "remainder" resembles a reversion in that it is an estate conferring a right to possession at a future time, viz., after the expiration of a particular estate; but it differs from a reversion not only in respect of the mode in which it comes into existence, but also in the matter of tenure; for whereas, upon the creation of a particular estate, leaving a reversion in the grantor, the owner of the particular estate holds as tenant of the reversioner, there is no tenure as between the owner of a particular estate and a person having an estate in remainder (*r*).

Again, a reversion arises, as we have seen, by operation of law

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(*o*) 8 & 9 Vict. c. 106, s. 9. See the observations in Dav. Conc. Prec. p. 18.

(*p*) Observe that this section applies only to cases of extinguishment of the lease by surrender or merger. But it appears not to apply to cases of disclaimer of a lease by the trustee in bankruptcy of the lessee under s. 55 of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52). See *Ex parte Walton*, 17 Ch. D. 746; *East and West India Dock Co.* v. *Hill*, 9 App. Cas. 448. As to disclaimer in bankruptcy, see Dav. Conc. Prec. 152, note (*b*); and Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 13.

(*q*) 44 & 45 Vict. c. 41, s. 10.

(*r*) Litt. s. 215; Challis, R. P. 20.

Chap. VIII. in consequence of the creation of a particular estate. In the words of Coke, "a reversion is where the residue of the estate always doth continue in him that made the particular estate" (s). But a remainder differs from a reversion in that it arises by the act of the party who creates the particular estate. "The remainder," says Coke, "is a residue of an estate in land depending upon a particular estate and created together with the same" (t). And again, he defines a remainder as "a remnant of an estate in lands or tenements, expectant upon a particular estate, created together with the same at one time" (u).

Here by "the particular estate" is meant the first estate limited which confers the right to the immediate possession. But subsequent particular estates, *i.e.*, estates less than the fee simple, may be at the same time limited; and these subsequent particular estates will be remainders; for any estate limited to take effect in possession after the determination of another estate (according to the limitation of that estate as distinguished from its determination by a condition (x)) is a remainder (y).

A remainder, therefore, is necessarily an estate created in favour of a stranger, while a reversion is that part of the original estate of the grantor which is retained by him. It follows that a remainder must, as Coke points out, be created together with the particular estate and at the same time.

(s) Co. Litt. 22b.

(t) Co. Litt. 49a.

(u) Co. Litt. 143a.

(x) *Ante*, p. 181; Fearne, C. R. 261.

(y) "*Remainder* and *reversion* are both relative terms, each depending upon the relation of an estate which is posterior in point of time to an estate which is prior in point of time. The prior estate is in both cases styled the *particular* estate. The distinction between a remainder and a reversion lies in the difference in the relation borne by them respectively to the particular estate; and this relation depends upon the circumstances under which the particular estate became separated from the reversion or remainder. A remainder is constituted by the act, expressly directed to that end, of a grantor or settlor, who simultaneously derives two (or more) estates out of his own estate and limits them to different persons by way of succession, in such a way that the estates may successively become the estate in possession, each of them (except the first in order) giving a *present title* to the *future possession*. Of two estates so created, that which is posterior subsists as a remainder in expectancy upon that which is prior in the order of time and of limitation. A reversion, without any express act of the grantor or settlor, is left in him by the operation or construction of law, when he merely parts with less than his whole estate, retaining in himself a residue which awaits the determination of that with which he has parted, before it can become the estate in possession;" Challis, R. P. 59. See the remarks of Mr. Fearne (C. R. p. 3, note (c)) on Coke's definition of a remainder.

An estate in Remainder is defined by Blackstone (z) to be—

"An estate limited to take effect and be enjoyed after another estate is determined. As if a man seised in fee simple granted lands to A. for twenty years, and after the determination of the said term, then to B. and his heirs for ever: here A. is tenant for years, remainder to B. in fee. In the first place an estate for years is created or carved out of the fee, and given to A.; and the residue or remainder of it is given to B. But both these interests are in fact only one estate; the present term of years, and the remainder afterwards, when added together, being equal only to one estate in fee. They are, indeed, different parts, but they constitute only one whole: they are carved out of one and the same inheritance: they are both created, and may both subsist together; the one in possession, the other in expectancy. So if land be granted to A. for twenty years, and, after the determination of the said term, to B. for life; and, after the determination of B.'s estate for life, it be limited to C. and his heirs for ever: this makes A. tenant for years, with remainder to B. for life, remainder over to C. in fee. Now here the estate of inheritance undergoes a division into three portions: there is, first, A.'s estate for years carved out of it: and after that, B.'s estate for life, and then the whole that remains is limited to C. and his heirs. And here also the first estate, and both the remainders, for life and in fee, are one estate only; being nothing but parts or portions of one entire inheritance: and if there were a hundred remainders, it would still be the same thing; upon a principle grounded on mathematical truth, that all the parts are equal, and no more than equal, to the whole. And hence, also, it is easy to collect, that no remainder can be limited after the grant of an estate in fee simple: because a fee simple is the highest and largest estate that a subject is capable of enjoying; and he that is tenant in fee hath in him the whole of the estate: a remainder, therefore, which is only a portion, or residuary part, of the estate, cannot be reserved after the whole is disposed of. A particular estate, with all the remainders expectant thereon, is only one fee simple; as £40 is part of £100, and £60 is the remainder of it: wherefore, after a fee simple once vested, there can no more be a remainder limited thereon than after the whole £100 is appropriated there can be any residue subsisting."

Right to enter immediately on cesser of prior interest.

In all the above circumstances in which a series of estates is created one after another, each succeeding estate in the series has to wait for the determination of the one preceding it before the possession of the lands can be enjoyed by its owner. The moment, however, that the prior estate ceases to exist, or determines, from whatever cause the cesser or determination takes place, the right to enter on the enjoyment devolves on the person entitled to the succeeding estate. Thus, let there be an estate to A. for his life with remainder to B. in fee. If A. incur a forfeiture of his estate, B. would have an immediate right of

(z) Vol. ii. 164.

entry. A.'s estate having gone, B. would have a right to immediate possession without waiting for A.'s death. Indeed, in the case of successive grants for life to different individuals, as, for instance, to A. for life, remainder, or as it is usually expressed "after his death," to B. for life, and after his death to C. for life, and so forth; though the remainders to B. and C. and the rest of the series were all for life, and all the lives would naturally be wearing out together, nevertheless B., C., and the rest, would equally have successive estates in remainder, expectant as to all of them on the determination of A.'s life estate, as to C. on the determination of the estates of both A. and B., and as to the rest on all the preceding ones. The fee simple expectant on the last of the life estates might of course be granted in like manner as a remainder, or might be left in the grantor, in which case it would be the reversion.

But not only may there be distinct estates carved out of the same ownership in favour of particular individuals, but the same individual may be possessed of two different estates in the same land, as where lands are limited to A. for life, with remainder to B. in tail, with remainder to A. and his heirs. Here A. has a particular estate for life in possession and also a remainder in fee simple expectant on the determination of the estate tail of B.

Rule in Shelley's Case.

Limitations of estates of inheritance to the heirs of a person, who under the same instrument takes a prior estate of freehold, are subject to the operation of a rule of law known as "the rule in *Shelley's case*," from a case in the time of Queen Elizabeth reported by Coke (*a*), in which it was much discussed; but the rule existed long before the date of that case (*b*).

The rule in *Shelley's case* may be described, in the words of a learned writer (*c*), as referring to "the statement of the circumstances under which verbally distinct limitations, contained in the same instrument, one limitation being to a given person and the other being to his heirs, either general or special, will not give any distinct estate to the heir, but will give an estate of inheritance to the ancestor."

(*a*) 1 Rep. 93*b*. The case itself is intricate and not easily to be understood by beginners. The advanced student will find it admirably stated and expounded in Challis, R. P. 125. It is printed with notes in Tud. L. C., R. P. 589.

(*b*) The earliest known case in which the rule was applied is *Abel's Case*, Y. B. 18 Ed. 2, fol. 577 (translated in 7 Man. & Gr. 941, note).

(*c*) Challis, R. P. 123.

The Rule may be stated as follows :—

Where the ancestor takes an estate of freehold, and, in the same instrument, an estate is limited by way of remainder, either mediately (as to A. for life, remainder to B. for life or in tail, remainder to the heirs of A.) or immediately (as to A. for life with remainder to his heirs) to his heirs, or the heirs of his body, the word "heirs" is a word of limitation and not of purchase; and therefore the ancestor takes an estate in fee simple or in tail as the case may be, and the heir or heir of the body of the ancestor takes no original estate (*i.e.* no estate primarily vested in himself and not claimed by him derivatively through his ancestor). The remainder is said to be "immediately executed in possession in the ancestor taking the freehold" (*d*). The rule applies where the ancestor, being the grantor, takes a particular estate by implication (*e*).

The Rule does not apply where the two limitations are not contained in one and the same instrument; nor where one is legal and the other equitable (*f*); but there is no difference, as to its application, between deeds and wills (*g*).

No tenure between tenant for life and remainderman.

To pass to the second distinction, that of the non-existence of tenure. In the case of a reversion, a tenure exists between the owner of the particular estate and the reversioner; the former owes fealty to, and may have to pay rent to the latter. In the case of a remainder, however, no such tenure exists. Suppose an estate limited to A. for his life, with the remainder to B. in fee, A. does not hold of B. any more than B. of A. Both A. and B. derive their estates from the same source: viz., the grant of the former owner in fee simple, to whose ownership they have succeeded; and the one has no more right to be lord than the other; but both A. and B. hold of the lord of whom the person who conveyed to them held; and where the power of tracing the mesne lord has been lost by lapse of time, the land is considered to be held of the Crown as lord. In the case, accordingly, of every grant of a particular estate, with remainder in fee simple, the two estates, though belonging to different individuals, are both, in legal theory, held of the same lord.

Means of creating freehold estate *in futuro*.

The ancient common law insisted upon two principles, having

(*d*) Fearne, C. R. 28.

(*e*) Elph. N. & C. Interp. 287.

(*f*) See Elph. N. & C. Interp. 243, 244; *Richardson* v. *Harrison*, 16 Q. B. D. 85.

(*g*) *Re White and Hindle*, 7 Ch. D. 201.

their origin in feudal law: first, that the tenancy should never be vacant, or, should be always, as it was termed, "full," in order that there might be always present a person to render the services due in respect of the tenancy; and secondly, that the creation of a freehold interest could only be effected by the open transfer of the property—the public delivery of possession, or, as it was termed, "livery of seisin." It followed from these two principles, that down to the time at which, as we shall hereafter see, a new principle was introduced by the doctrine of Uses, no future estate could be limited at common law except one created by way of remainder upon an antecedent particular estate. By any attempt to create a freehold estate to take effect at a future period, with no intermediate limitation of the freehold, both these principles would have been infringed; *e.g.* if A., seised in fee, limited an estate to B. (or to B. and his heirs) from a future day. The estate being to take effect only *in futuro*, there would have been no one in the mean time to perform the services, and there could not be a present livery of seisin. But what could not be effected directly might be accomplished indirectly by the creation of a particular estate of freehold, to take effect in possession immediately, followed by an estate which, though future, was to take effect by way of remainder immediately on the termination of the particular estate. The particular estate carried with it the immediate seisin, and the remainder taking effect on its expiration, the particular estate played the part of a prop or support, on which it was said the remainder might lean.

Thus, Blackstone says (*h*):—

"Future estates can only be made of chattel interests, which were considered in the light of mere contracts by the ancient law, to be executed either now or hereafter, as the contracting parties should agree: but an estate of freehold must be created to commence immediately. For it is an antient rule of the common law, that no estate of freehold can be created to commence *in futuro;* but it ought to take effect presently, either in possession or remainder: because at common law no freehold in lands could pass without livery of seisin; which must operate either immediately, or not at all. It would, therefore, be contradictory, if an estate, which is not to commence till hereafter, could be granted by a conveyance which imports an immediate possession. Therefore, though a lease to A. for seven years, to commence from next Michaelmas, is good; yet a conveyance to B. of lands, to hold to him and his heirs for ever from the end of three years next ensuing, is void. So that when it is intended to grant an estate of freehold, whereof the enjoyment shall be

(*h*) Vol. ii. 165.

deferred till a future time, it is necessary to create a previous particular estate, which may subsist till that period of time is completed; and for the grantor to deliver immediate possession of the land to the tenant of this particular estate, which is construed to be giving possession to him in remainder, since his estate and that of the particular tenant are one and the same estate in law. As, where one leases to A. for three years, with remainder to B. in fee, and makes livery of seisin to A.; here, by the livery, the freehold is immediately created, and vested in B. during the continuance of A.'s term of years. The whole estate passes at once from the grantor to the grantees, and the remainderman is seised of his remainder at the same time that the termor is possessed of his term (*i*). The enjoyment of it must, indeed, be deferred till hereafter; but it is to all intents and purposes an estate commencing *in præsenti*; though to be occupied and enjoyed *in futuro*."

Production of holder of particular estate.

The statute 6 Anne, c. 18 (*ii*), enables a person having an estate in reversion or remainder expectant on the death of another, on affidavit stating his belief that the *cestui que vie*—*i.e.*, the person for whose life the estate is holden—is dead, to obtain an order from the Lord Chancellor for the production of the *cestui que vie* if living, and declares that, if not produced, he is to be accounted dead, and the remainderman or reversioner is authorised to enter upon the land as if the *cestui que vie* were actually dead; and any one continuing to hold possession without the consent of the reversioner, or remainderman, as the case may be, is adjudged a trespasser, and may be proceeded against accordingly (*j*).

Remainders have been divided into the two classes of Vested and Contingent.

Vested remainder.

A Vested Remainder is one which is necessarily capable of taking effect whenever the particular estate on which it is expectant comes to a termination. Thus, suppose an estate limited to A. for his life with remainder to B. and his heirs; the limitation to B. and his heirs, not being dependent upon any contingency, must necessarily come into operation whenever the estate of A. ends. The uncertainty affecting the time of the termination of A.'s estate has no effect on B.'s estate. The instant that A.'s estate determines, whether by death or forfeiture, B.'s estate comes into possession. And this would be the case if the remainder were limited to B. for his life only instead of in fee For though it is possible that B. may die before A., and that B may never come into the actual enjoyment of the estate, still

(*i*) See Litt. s. 60, Co. Litt. 49*a*.

(*ii*) See *ante*, p. 36.

(*j*) See *Re Owen*, 10 Ch. D. 166; and *Re Pople*, 40 Ch. D. 589.

Chap. VIII. there is a right on the part of B. to take if A.'s estate falls in during his life, and, where B.'s estate is a fee simple, on the part of B.'s heirs to take if A. outlives him; and the law does not regard the uncertainty, whether he might be alive to take the benefit of the gift or not, as affecting the question of the remainder itself being vested (*k*). "The person entitled to a vested

"Vest."

(*k*) As to the meaning of the word "vested," Mr. Hawkins (on Wills, p. 221) remarks:—

"The word 'to vest' has several senses, which it is important to distinguish.

"Originally the word had reference only to real estate. As applied to estates in land, 'to vest' signifies the acquisition of a portion of the actual ownership or feudal possession of the land (*vestire*—seisinam dare—infeodare; Spelman): the acquisition, not of an estate in possession, but of an actual estate. The fee simple being supposed to be carved out into parts or divisions by the creation of particular estates, a grant to any person of one of these portions of the fee vested him with, or vested in him, an estate in the land. Thus 'vested' is nearly equivalent to 'possessed.'"

In this, its original sense, 'vested' has no reference to the absence of conditional-ness or contingency. If an estate tail be limited to A., with remainder to B., the estate of B. is a vested remainder, not because the failure of issue of A. is considered an event certain at some time or other to happen, as has been alleged (Smith's View of Executory Interests, sect. 192):—failure of issue of a person is an event altogether contingent:—but because such a remainder vests in B. an actual portion of the fee, though the time of its falling into possession is wholly contingent and uncertain. B. is invested with a portion of the ownership of the land.

"All remainders, not vested, are in fact contingent, not as being necessarily limited on an uncertain event, but because their taking effect depends on the contingency of their happening to vest during the continuance of the particular estate which supports them, and which may determine at any moment. Thus 'vested' comes to mean the opposite of 'contingent' or conditional. But the word itself refers, as has been said, not to contingency but to possession.

"It is obvious that this division into 'vested' and 'contingent' fails when applied to future executory interests in land, not taking effect as remainders. An executory devise, after a fee simple, cannot be said to be 'vested' as an estate, until it vests in possession; yet it may be limited on an event absolutely certain to happen, and is, therefore, not contingent. When, therefore, Fearne (C. R. Introduction, p. 1) divides 'vested estates' into (1) estates vested in possession, and (2) 'estates vested in interest, as reversions, vested remainders, such executory devises, future uses, conditional limitations, and other future interests as are not referred to or made to depend on a period or event that is uncertain,' he uses the expression 'vested in interest' in a different sense from that which it bears as applied to a remainder. Thus, the word is already losing its original meaning.

"The only definition that can be given of the word 'vested' in English law, as applied to future interests, other than remainders, is, that it means 'not subject to a condition precedent:' what amounts to a condition precedent, the cases only can determine. As applied to remainders in land, the word retains its original sense, denoting the actual possession of an *estate in* the land." (*I.e.*, as distinguished from actual possession of the land itself.)

Mr. Challis says (R. P. 56):—"An estate is said to be vested in interest in a given person, when that person would be entitled, by virtue of it, to the actual possession of the lands, if the

remainder has an immediate fixed right of future enjoyment; that is, an estate *in præsenti*, though it is only to take effect in possession and pernancy of profits at a future period" (*l*).

Contingent remainder.

A Contingent Remainder is one which, from some uncertainty in respect either of the person designated to take under the limitation, or of the event upon the happening of which the estate is limited to commence, may fail to take effect. The estate is said to commence at a future time in interest as well as in possession (*m*). Thus, as regards uncertainty of person, the limitation may be to a person not in existence (not *in esse*, as it is called), or not ascertained; as regards uncertainty of event, the event may not happen at all, or it may not happen until after the particular estate has determined. It is a rule, as we have seen, affecting every remainder, that it must take effect immediately on the determination of the particular estate. If any uncertainty exist, either as to the person to take, or the event upon which the estate is to commence, the remainder itself must be contingent (*n*); for if, when the particular estate determines, that person is not ascertained, or that event has not happened, the remainder will fail.

Illustrations.

Remainders, which are contingent because limited to an uncertain person, may be exemplified by limitations to A. for life, with remainder to the first son of B., who has then no son born; or to A. and B. for their joint lives, with remainder to the survivor in fee; for in either case the remainderman is not ascertained. Remainders which are contingent because limited on an uncertain event, may be exemplified by limitations to A. for life with remainder to B. for life, and if B. should die before A., then the remainder to C. for life; for B.'s dying before A. is an event which may never happen, and therefore the remainder to C. is contingent; or by limitations to A. for life, and after the death of B., the lands to remain to another in fee; for, though it

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estate should become the estate in possession by the determination of all the preceding estates."

(*l*) 2 Cruise Dig. 204.

(*m*) "An estate is contingent when a right of enjoyment is to accrue on an event which is dubious and uncertain;" Fearne, C. R., p. 2.

(*n*) According to some opinions, contingent remainders were in ancient times invalid (see Wms. R. P. 303). It seems to have been first determined that if land be leased to A. for life, with remainder to the right heirs of J. S., a living person, the remainder is good. A limitation to the "heirs" of a deceased person, whether in a deed (Elph. N. & C. Interpr. 228), or a will (2 Jarman, 61), confers a fee simple on the person who happens to be his heir.

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is certain that B. must die, his death may not happen until after A.'s life estate shall have determined.

Where a life estate is limited to A., with remainder to his first-born child, and A. dies without having had any child born, but a child is born to him after his death, the remainder would, upon a strict application of the rule above stated, fail to take effect: but by 10 & 11 Wm. III. c. 16, posthumous children are enabled to take estates as if born in their father's lifetime, where the estate is limited in remainder by marriage or other settlement.

Contingency with double aspect.

It follows from the very nature of the case that, if all the fractional interests carved out of an estate exhaust the estate, no ulterior limitation can be superadded. It is obvious, therefore, that one estate in fee simple cannot be limited by way of remainder on another, nor, indeed, after a fee simple can any remainder at all be limited. This, however, does not prevent alternative limitations of several contingent remainders even in fee. Thus an estate may be given to A. for his life, and, if he have a son, to that son in fee, but, if he have no son, to a daughter in fee; the latter limitation is not a remainder on, but is substitutionary for the former; and both are remainders on the particular estate. Limitations of this nature are described as contingencies "with a double aspect" (*o*).

Contingent remainder may become vested.

A remainder, contingent in its original limitation, may become vested by subsequent events. Thus, where the limitations are to A. for his life, with remainder to the first son whom B. may have, B. having none at the time, so long as B. has no son born, the remainder is contingent; but as soon as a son is born (in A.'s lifetime), it becomes vested. The happening of the event upon which the remainder is contingent converts it into a vested remainder.

Rules for creation.

From the doctrine of the common law to which we have referred—that the tenancy must never be vacant, there followed the rule that every contingent remainder of an estate of freehold must have a particular vested estate of freehold to support it. It could not be limited to take effect after a term of years, or at some future time other than the determination of the particular estate; for in such cases there would be a time during which the seisin would be without an owner. The freehold must pass out of the grantor at the time the remainder is created. Now the freehold passed by livery of the seisin, which

(*o*) *Loddington* v. *Kime*, 1 Salk. 224; Fearne, C. R. 373; Challis, R. P. 61.

was a transfer of the immediate possession. Consequently, if the first limitation was for years only, the next limitation could not be a remainder; for, if it were, the freehold would be in abeyance during the term (*p*). Moreover, every estate in expectancy, in order to be valid by way of remainder, must be so limited as to take effect in possession immediately on the determination of the particular estate. It follows that every contingent remainder must vest either during the continuance of the particular estate, or *eo instanti* that it determines (*q*).

Thus, says Mr. J. Williams (*r*):—

"Suppose lands to be given to A. for his life, and after his decease to such son of A. as shall first attain the age of twenty-four years. As a contingent remainder, the estate to the son is well created; for the feudal seisin is not necessarily left without an owner after A.'s decease. If, therefore, A. should, at his decease, have a son who should then be twenty-four years of age or more, such son will at once take the feudal possession, by reason of the estate in remainder which vested in him the moment he attained that age. In this case the contingent remainder has vested during the continuance of the particular estate. But if there should be no son, or if the son should not have attained the prescribed age at his father's death, the remainder will fail altogether. For the feudal possession will then, immediately on the father's decease, revert, for want of another owner, to the person who made the gift in right of his reversion. And, having once reverted, it cannot now belong to the son, without the grant to him of some fresh estate by means of some other conveyance."

Destruction.

Every remainder, then, requiring a particular estate of freehold for its support, it follows that, if before the contingency happened the particular estate ceased to exist, the remainder must fail. Thus, if the particular estate came to its natural termination or was forfeited, surrendered, or merged before person to take in remainder came into existence, the remainder, which depended on the particular estate for its support, would fail; accordingly, down to a very modern period, all remainders of the contingent class, as regards forfeiture, surrender, or merger, were very much at the mercy of the owner of the particular estate. A remedy, however, was provided for this by the Act to amend the Law of Real Property (*s*), which enacted that:—

Forfeiture, surrender, or merger of particular estate.

S. 8. "A contingent remainder existing at any time after the 31st day of December, 1844, shall be, and if created before the

(*p*) Fearne, C. R. 281, 307.
(*q*) Challis, R. P. 93.
(*r*) Wms. R. P. 311.
(*s*) 8 & 9 Vict. c. 106.

passing of this Act shall be deemed to have been, capable of taking effect, notwithstanding the determination by forfeiture, surrender, or merger, of any preceding estate of freehold, in the same manner in all respects as if such determination had not happened."

Natural determination of particular estate.

But, although by that statute contingent remainders were protected against the destruction of the preceding particular estate by forfeiture, surrender, or merger, they were still left liable to destruction by the natural determination of all the preceding particular estates before the happening of the contingency on which the remainder was to vest. This occurred in a case (*t*) where a testator devised real estate to A. and B. and their heirs to the use of A. and B., their executors, administrators, and assigns, for 120 years, if S., the wife of C., should so long live, and subject thereto, to the use of C. for life with remainder to the use of A. and B. and their heirs during his life upon trust to support contingent remainders, with remainder to the use of all the children of C. and S. who should be living at the death of the survivor of them and the respective heirs and assigns of such children, as tenants in common. C. died in the life of S. It will be observed that the contingent remainder to the children was to vest on the death of the survivor of C. and S., and that the particular estate determined naturally on the death of C. in the lifetime of S., so that the remainder to the children failed for want of an estate of freehold to support it. In consequence of this case an Act (40 & 41 Vict. c. 33) was passed to prevent a similar result in the case of any instrument executed after its passing, viz., 2nd August, 1887. It provides that

40 & 41 Vict. c. 33.

S. 1. "Every contingent remainder created by any instrument executed after the passing of this Act or by any will or codicil revived or republished by any will or codicil executed after that date, in tenements or hereditaments of any tenure, which would have been valid as a springing or shifting use or executory devise or other limitation had it not a sufficient estate to support it as a contingent remainder, shall, in the event of the particular estate determining before the contingent remainder vests, be capable of taking effect in all respects as if the contingent remainder had originally been created as a springing or shifting use or executory devise or other executory limitation."

The student will not be able to understand the effect of this Act until he has learnt the meanings of "springing" and "shifting uses" and "executory devises" (*u*).

(*t*) *Cunliffe* v. *Brancker*, 3 Ch. D. 393. (*u*) See *post*, pp. 272 *et seq.*

Trustees to preserve contingent remainders.

Limitations to trustees to preserve contingent remainders are explained by a learned author (*x*) as being limitations "from and after the determination of the estate of tenant for life, by forfeiture or otherwise in his lifetime, to some trustees during his life in trust to preserve the contingent remainders expectant on his decease from being destroyed, to which they would otherwise be liable from his surrender, forfeiture, or tortious alienation." Thus, let the limitations be to A., a bachelor, for his life, and after his death, to his eldest son and the heirs of his body, and in default of such issue, to B. and his heirs. In order to preserve the contingent remainder to the son of A., a limitation was formerly introduced in the form above described. On this Mr. Williams (*y*) observes :—

An estate for the life of A., to take effect in possession after the determination, by forfeiture or otherwise, of A.'s life interest, is not a contingent, but a vested estate in remainder. It is a present existing estate, always ready, so long as it lasts, to come into possession the moment the prior estate determines. The plan, therefore, adopted for the preservation of contingent remainders to the children of a tenant for life was to give an estate, after the determination by any means of the tenant's life interest, to certain persons and their heirs during his life, as trustees for preserving the contingent remainders; for which purpose they were to enter on the premises, should occasion require, but should such entry be necessary, they were nevertheless to permit the tenant for life to receive the rents and profits during the rest of his life. These trustees were prevented by the Court of Chancery from parting with their estate, or in any way aiding the destruction of the contingent remainders which their estate supported. And, so long as their estate continued, it is evident that there existed, prior to the birth of any son, three vested estates in the land; viz., the estate of A., the tenant for life, the estate in remainder of the trustees during his life, and the estate in fee simple in remainder, belonging, in the case we have supposed, to B. and his heirs. This vested estate of the trustees, interposed between the estates of A. and B., prevented their union, and consequently prevented the remainder in fee simple from ever coming into possession, so long as the estate of the trustees endured, that is, if they were faithful to that trust so long as A. lived. Provision was thus made for the keeping up of the feudal possession until a son was born to take it; and the destruction of the contingent remainder in his favour was accordingly prevented. But now that contingent remainders can no longer be destroyed, of course there will be no occasion for trustees to preserve them."

It should be noticed here that the rule of law which required that a contingent remainder should be supported by a particular

(*x*) Fearne, C. R. 325; see Challis, R. P. 113.

(*y*) R. P. 322.

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estate of freehold applied only to legal estates. Where the limitations are equitable, the legal estate is in the trustee and therefore there is no abeyance of the freehold (z).

Alienation.

Contingent remainders, so long as they remain in contingency, were formerly regarded as mere possibilities of succession; and, not being interests amounting to what the law regarded as estates, they were not subject to the ordinary modes of alienation to which estates were subject—that is to say, they could not be alienated at law otherwise than by fine or recovery, though they might be assigned in equity (a). They are expressly made devisable by the Wills Act (b); and by the Act to amend the Law of Real Property (c), a contingent interest, and a possibility coupled with an interest, in any tenements or hereditaments, whether the object of the gift or limitation of such interest or possibility be or be not ascertained, may be disposed of by deed.

Remainder to child of unborn person—void.

We have above (d) referred to the rule of law known as the rule against perpetuities, which, in order to prevent the tying up of estates in perpetuity, or rather beyond a reasonable limit, restricts the inalienability of property to a life or lives in being and twenty-one years after. Another rule, having reference to remainders, is that, if an estate is given to an unborn person for his life, for example, a child of A., before A. has a child born, there cannot be limited, by way of remainder on that life estate, an estate to the child of that unborn person. It has recently (e) been held that this rule is an absolute rule, independent of the "rule against perpetuities," and that therefore a limitation which transgresses it is void, even though the estate limited would necessarily vest within the period allowed by the "rule against perpetuities" (e). The remainder is sometimes said to be void because it is "a possibility upon a possibility" (f). Where limitations of this nature are contained in a will (g), although they cannot be carried out in the precise manner indicated by the testator, still, in some cases, the Court, discovering in the will a

"*Cy-près*" construction—on wills.

(z) Fearne, C. R. 303; and so where the legal estate is vested in a mortgagee; *Astley* v. *Micklethwait*, 15 Ch. D. 59; Challis, R. P. 95.

(a) Challis, R. P. 58; Fearne, C. R. 366; and, as to fines, see *ante*, 65.

(b) 1 Vict. c. 26, s. 3.

(c) 8 & 9 Vict. c. 106, s. 6.

(d) *Ante*, p. 97.

(e) *Whitby* v. *Mitchell*, 44 Ch. D. 85; affirming the decision of Kay, J., 42 Ch. D. 494: and see *Re Frost*, 43 Ch. D. 246.

(f) See Butler's Note to Fearne, C. R. 565; 4 Cruise, Dig. 350.

(g) See notes to *Cadell* v. *Palmer*, Tudor, L. C. R. P.

"general intention" that the property should devolve on the testator's issue in succession, has carried out this intention as far as the rules of law will admit, namely, by construing the limitations to the unborn child and his children as a limitation to him in tail, instead of as distinct limitations to him for life, with remainder to his children, so that, although the tenant in tail can bar his estate tail and dispose of the property, still if he does not disentail, the estate will descend to his issue. The doctrine, under which this construction of the will is made, is called the "*cy-près*" doctrine (*h*).

There are two cases of frequent occurrence, in which the *cy-près* doctrine is applied, and which have been stated (*i*) as follows:—

"If real estate be devised to A. for life, with remainder to his first and other sons successively in tail, with remainder to his daughters as tenants in common in tail, with cross remainders between them, and A., is unborn at the death of the testator, A. is held to take an estate tail."

"If the devise be similarly to A. (the unborn person) for life, with remainder to his first and other sons in tail male, A. is held to take an estate in tail male."

The rule is not applied where the estates given to the unborn children of the unborn child are in fee simple (*k*), nor where those estates are for life only (*l*). Possibly it may be held to apply where there is an attempt to create estates for life in succession for ever (*m*).

(*h*) The cases on the application of this doctrine will be found collected in Fearne, C. R. 204, note; and Theobald on Wills, 411. Some of the distinctions are very nice and are not adapted for the consideration of the student.

(*i*) Hawkins on Wills, 181.

(*k*) *Hale* v. *Pew*, 25 Beav. 335.

(*l*) *Seaward* v. *Willcock*, 5 East, 198.

(*m*) *Forsbrook* v. *Forsbrook*, L. R. 3 Ch. 98; *Mortimer* v. *West*, 2 Sim. 274.

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CHAPTER IX.

JOINT TENANCY.—COPARCENARY.—TENANCY IN COMMON.

ESTATES may be held (1) in Severalty; (2) in Joint Tenancy: (3) in Coparcenary; or (4) in Common.

I. Severalty.

Severalty is the ordinary species of ownership, and an estate is said to be held in Severalty when it is held by some individual or body corporate in a separate ownership, and without the participation in that ownership of any other party. Thus, in the case of a grant to A., being a private individual, or of a grant to a corporation, A. in the one case, and the corporation in the other, would each take an estate in severalty. They would not do this the less, if, in the former case the grant were to A. and his heirs, or to A. and the heirs of his body, in the latter to the corporation and their successors, since the words of inheritance or succession, though they point in terms to other parties, indicate only the estate conferred by the grant.

It is the individual and exclusive ownership that distinguishes an estate in Severalty from the other kinds of ownership referred to. In each of the latter cases the tenant has no exclusive ownership in the land, or in any separate parcel of it. A joint tenant or coparcener owns the whole concurrently with others: a tenant in common is exclusive owner of an undivided share in the whole. But in the case of estates in land, or in a house, held under either of these modes of ownership, no one person has an exclusive right to any separate or particular acre of the land or room in the house. Each has, as the case may be, either concurrent ownership in the whole, or exclusive ownership in an undivided share in the whole. But if a partition of the property be made and the share of each be allotted to him, then each will take certain ascertained parcels of the land or rooms of the house, which will thenceforth be held by him in severalty.

While possessing this common characteristic, each of the three interests, joint-tenancy, coparcenary, and tenancy in common, has features distinguishing it from the others.

II. Joint tenancy.

Right of survivorship.

Joint tenancy (*a*), as its name indicates, is essentially a joint interest: whatever may be the rights as between themselves, as regards strangers all the holders of an estate in joint tenancy are regarded as a single individual. It follows that, in case of the death of one of the joint tenants the whole estate belongs to the survivors or survivor (*b*). Thus, in the case of a grant of lands to A. and B. jointly for their lives, each will be entitled to a moiety or equal half of the rents and profits during their joint lives; but the death of one does not put an end to the estate; it only causes a survivorship or representation to the whole estate in the other, and gives him the entire interest in the rents and profits. So, if lands be given to A. and B. and their heirs, on the death of either A. or B. the survivor takes the whole estate in fee simple. It is this right of survivorship which is the most marked characteristic of Joint Tenancy; and therefore there cannot be a joint tenancy between a natural person and a corporation (*c*).

Such is the general rule: but in the case of an estate tail—*e.g.*, to A. for life, and after his death to his children, and the heirs of their respective bodies—there is an exception; the donees in tail are joint tenants for their lives with several inheritances in tail (*d*). A gift to persons who cannot intermarry, and the heirs of their bodies, creates a joint tenancy for life, and several inheritances in tail (*e*).

By reason of the right of survivorship (the "*jus accrescendi*," as it is called) the lands of a joint tenant are not liable to dower or curtesy (*f*).

If, by the death of all the joint tenants but one, the ownership has become one in severalty, dower will attach. There is an old case (*g*), which occurred in the time of Queen Elizabeth, where a father and son, being seised as joint tenants, with remainder to the heirs of the son, had the misfortune to be hanged; and both were hung at the same time in one cart. The son's wife could only be entitled to dower if her husband survived his father,

(*a*) Litt. s. 277; Co. Litt. 180*a*; Challis, R. P. 294; 2 Cruise, Dig. 363.

(*b*) Litt. s. 280; Co. Litt. 181*a*.

(*c*) See *Law Guarantee Society* v. *Bank of England*, 24 Q. B. D. 406; and Co. Litt. 190*a*; 2 Wms. Saund. 318, note (4), and other authorities cited in that case.

(*d*) *In re Tiverton Market Act*, 20 Beav. 375; *Tufnell* v. *Borrell*, L. R. 20 Eq. 194.

(*e*) For the reasons why an estate tail generally cannot be limited in joint tenancy, see Challis, R. P. 294.

(*f*) Co. Litt. 183*a*. Notes to *Morley* v. *Bird*, Tudor, L. C. R. P., p. 884.

(*g*) *Broughton* v. *Randall*, Cro. Eliz. 503.

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since, had the father survived, there would not have been that sole seisin in the son upon which alone the dower would attach. The Court inferred from the facts proved that the son was the survivor, and therefore awarded dower to the wife.

It should here be noted that in certain cases, though there may be a joint tenancy at law, the beneficial interest is held in equity not to be joint, and there is then no *jus accrescendi* (*h*).

On the principle expressed in the maxim *jus accrescendi præfertur oneribus*, a rent-charge granted by a joint tenant is not binding on the joint tenants who survive him (*i*).

Unities.

A Joint Tenancy always arises by "purchase" (*j*), and there are certain conditions to its creation, namely, (1) unity of title; (2) unity as to the time of the title's commencement; (3) unity of interest as regards the quantity of the estate, and (4) unity of possession as well of every part as of the whole. These conditions are sometimes called the four "unities" of title, time, interest and possession (*k*).

1. of title.

By "unity of title" is meant that the estate must be created by one and the same instrument, or originate in one and the same act (*l*). Thus, one party cannot acquire his title by deed and another by will, or partly by one and partly by the other; and so, if the title be one originating in wrong, as by the disseisin (*m*) of some former holder, all the parties claiming to hold a joint tenancy under the disseisin must derive their title under one and the same disseisin, not under ousters effected at different periods (*n*).

A recent instance occurred of the application of this doctrine. Two persons were in lawful possession of a property, but the title under which they held came to an end—they were tenants *pur autre vie*, and the life ended, yet they continued in possession as owners; thus they went on holding without any title whatever,

(*h*) See *Lake* v. *Craddock*, 1 W. & T. L. C. and notes. Familiar instances are lands held as partnership property, and mortgages (see *Re Jackson*, 34 Ch. D. 732).

(*i*) Litt. s. 286. Notes to *Morley* v. *Bird*, Tudor, L. C. R. P.

(*j*) 2 Cruise, Dig. 364 (s. 3).

(*k*) So Cruise (quoted in *Morley* v. *Bird*, Tudor, L. C. R. P. 882); and Blackstone, vol. ii. 180. Mr. Challis (R. P. 295, 296) observes that this analysis "means only that each joint tenant stands, in all respects, in exactly the same position as each of the others; and that anything which creates a distinction either severs the joint tenancy or prevents it from arising."

(*l*) It must be created by some act, for an estate in joint tenancy cannot arise by descent (2 Bl. 181).

(*m*) *i.e.*, a wrongful putting out of him that is seised of the freehold.

(*n*) 2 Bl. 181; Litt. s. 278.

and so continued for more than twenty years. The question arose in what capacity they so held on. It was decided that they held as joint tenants. Lord Hatherley said:—

"The possession of each became wrongful at the same moment of time, so that they acquired their title at the same moment of time; they held by one common right or by one common wrongful title, whichever you please to call it, and they have done nothing to sever their tenancy" (*o*).

2. of time.

As regards the "unity of time," of the commencement of title, the estate must vest in every member of the body at one and the same moment of time, for the different individuals form together but one person. This is shown by the words hitherto used in creating a joint estate in fee simple, for it is limited to A., B., and C., and their heirs, though the heirs of one only, namely, of the survivor, will succeed to the inheritance. Thus, says Lord Coke (*p*):—

"If lands be demised for life, the remainder to the right heirs of J. S. and J. N.; J. S. hath issue and dieth; and after J. N. hath issue and dieth, the issues are not joint tenants, because the one moiety vested at one time, and the other moiety vested at another time."

Such is the doctrine of the common law; but estates taking effect under the Statute of Uses (which we shall consider in a subsequent chapter), though vesting at several times, may nevertheless be estates in joint tenancy. Thus, says Lord Coke (*q*):—

"If a man make a feoffment in fee to *the use* of himself and of such wife *as he should afterwards marry*, for term of their lives, and after he taketh wife, they are joint tenants, and yet they come to their estates at several times."

The reason of the difference is that, in the case of the use, the estate is vested and settled in the feoffees till the future use comes into *esse* (*r*). Another departure from the rule, that persons who are to take at different times cannot take as joint tenants, is in the case of estates created by devise. Thus, a testator devised lands to his widow for life, and after her death to his daughter

(*o*) *Ward* v. *Ward*, L. R. 6 Ch. 789.

(*p*) Co. Litt. 188*a*.

(*q*) *Ibid.*; and see notes to *Morley* v. *Bird*, Tudor, L. C. 882. As to the distinction where the limitation is to persons who are already husband and wife, see Co. Litt. 187*b* and note (2) there; Co. Litt. 310*a*; 2 Cruise, Dig. 375 (s. 50).

(*r*) Co. Litt. 188*a*, note (13), by Hargrave.

Isabella and her children and their heirs for ever (*s*). It was held that Isabella and her children took as joint tenants, she having one child at the time of the testator's death and other children subsequently born (*t*). Therefore, in the case put by Lord Coke of the gift in remainder to the right heirs of J. S. and J. N., though the issue of J. S. would not take as joint tenants, but as tenants in common with the issue of J. N., yet the issue of J. S. and J. N. respectively would take as joint tenants between themselves (*u*). The law is thus stated by Mr. Jarman (*v*):

"Under a limitation in remainder of a use to children, they are not as they come *in esse*, let in with other persons who have not the whole interest; but the whole body always hold the whole interest, letting in other members of the body as they come *in esse*. But at common law when the interest has once vested in remainder, the interest must vest either wholly or in a moiety; it must be either the one or the other, and there is no mode, as there is in a use, of getting the entirety into the remainderman, and then taking it out of him afterwards by the springing use as soon as the *cestui que use* comes *in esse*. Therefore, you have at once and for all to ascertain whether he would take the whole or a moiety: the intent being that he should take a moiety and not the whole, if he took the whole it would be against the intent. The result is, he takes a moiety, and holds it in common with the donee of the other moiety. A devise stands on the same footing in this respect as a conveyance to uses; and in the case of a trust, a Court of Equity will follow what is said to be the reason of the rule on uses and devises, viz., the intent, and the intent as appearing by the words, is to create a joint tenancy."

In a case before Page-Wood, V.-C. (*w*), the question arose under a will of personalty. There was a bequest of residuary personal estate to Harriet E. Leatham for life, and should she have a child or children then to it or them for ever. After the death of the testatrix Harriet married and had issue. It was held that, pursuing the intent of the gift, and by analogy to estates created by way of use or devise, as distinguished from estates raised by conveyance at common law, the children of Harriet, notwithstanding their interests vested necessarily at different times, namely as they came into *esse*, took as joint tenants.

(*s*) *Oates* d. *Hatterley* v. *Jackson*, 2 Str. 1172; Fearne, C. R. 313; and see other cases cited in Tud. L. C. R. P. 882, 883.

(*t*) *Kenworthy* v. *Ward*, 11 Ha. 203.

(*u*) *Bridge* v. *Yates*, 12 Sim. 645.

(*v*) Jarman on Wills, vol. ii. p. 254; the passage cited is in fact a summary of the judgment of Lord Hatherley (then Page Wood, V.-C.) in *Kenworthy* v. *Ward*, 11 Ha. 196.

(*w*) *Kenworthy* v. *Ward*, *supra*.

It has, however, been said by Kindersley, V.-C., in answer to some observations of Page-Wood, V.-C., that the case would have been different if the vesting of the children's estate depended, *e.g.*, on their attaining twenty-one (*x*). For where the remainder is limited to vest in such only of the class as attain twenty-one, then of necessity a tenancy in common is created; for there may be several children, some of age, others not, and those who have contingent interests cannot take as joint tenants with those who have vested interests, since there is no mutuality of survivorship (*y*).

3. of interest.

Next, as to the "unity of interest." The quantity, or duration, of the estate of each owner must be the same. One joint tenant cannot be seised for an estate of freehold, as for instance for life, and another for a chattel interest, *i.e.*, for years; nor can one be tenant in fee, and the other tenant in tail; nor can a reversion be held in joint tenancy with an estate in possession (*z*). This, however, does not prevent the creation of a joint tenancy as to a particular estate, consistently with estates in severalty in remainder, or *vice versâ*. Thus an estate might be limited to A. and B. for their joint lives, with remainder to A. in fee; the separate remainder in A. expectant on the determination of the estate for the lives of A. and B. would not prevent that estate from being one in joint tenancy. So, to reverse the illustration, in the case of the limitation of an estate for life to A., with remainder to A. and B. and their heirs, the remainder would constitute a joint tenancy in A. and B., notwithstanding A.'s separate interest in the prior particular estate (*a*).

4. of possession.

As to the "unity of possession," the joint tenants do not hold in distinct shares, but each has the whole seisin or possession of every part as well as of the whole. This peculiar undivided seisin is termed in the ancient law books, a seisin *per my et per tout* (*b*). As to this, Blackstone (*c*) says:—

"Joint tenants are said to be seised *per my et per tout*, by the half or moiety, and by all; that is, they each of them have the entire possession, as well of every parcel as of the whole. They have not, one of them a seisin of one half or moiety, and the other of the other moiety; neither can one be exclusively seised of one acre, and his companion of

(*x*) *Ruck* v. *Earwise*, 2 Dr. & Sm. 510.
(*y*) 2 Jarman on Wills, 255.
(*z*) Litt. s. 302; Co. Litt. 188*a*.
(*a*) 2 Bl. 181.
(*b*) Litt. s. 288.
(*c*) Vol. ii. 182.

another; but each has an undivided moiety of the whole, and not the whole of an undivided moiety (*d*)."

But "in another sense each has an aliquot share; namely for purposes of alienation, whether total or partial, and for purposes of forfeiture" (*e*).

The above must be taken subject to the provision of the Act, 3 & 4 Wm. IV., c. 27, which enacts—

> S. 12. "That when any one or more of several persons entitled to any land or rent as co-parceners, joint tenants, or tenants in common, shall have been in possession or receipt of the entirety, or more than his or their undivided share or shares of such land, or of the profits thereof, or of such rent for his or their own benefit, or for the benefit of any person or persons other than the person or persons entitled to the other share or shares of the same land or rent, such possession or receipt shall not be deemed to have been the possession or receipt of or by such last-mentioned person or persons or any of them."

Since the passing of the statute, therefore, the possession of the land by one cannot be considered as the possession of another; nor, consequently, can the entry of one have the effect of vesting the possession in the other (*f*).

Husband and wife tenants by entireties (*g*).

There has been cited above the case put by Lord Coke of a limitation to the use of two persons who afterwards intermarry, as illustrative of a joint tenancy arising under different periods of commencement of title. In such a case the husband and wife continue to be joint tenants after the marriage; and the husband may sever the joint tenancy by alienating his own interest. But a limitation to persons who are husband and wife at the time of the limitation makes them, not joint tenants, but tenants "by

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(*d*) "It is true that, for certain purposes, joint tenants are potentially seised of aliquot parts of the land held by them in jointure, as for the purpose of alienation in severalty, either by grant or by demise; so for the purposes of merger, and where the joint tenancy happens to be between two persons only, their potential aliquot parts may, without impropriety, be termed 'moieties.' But this is not implied in the terms '*per my et per tout;*' the term '*my*' signifying, not a 'moiety,' but 'not in the least.' And therefore Lord Coke (Co. Litt. 186*a*) gives the exact force of the expression 'seised *per my et per tout,*' by describing the party so seised as one, '*qui nihil habet et totum habet*'"; *Murray* v. *Hall*, 7 C. B. 455, note by Manning (Coke's words are—"Et sic totum tenet et nihil tenet, scil. totum conjunctim, et nihil per se separatim.")

(*e*) Challis, R. P. 296, citing Co. Litt. 186*a*.

(*f*) *Woodroffe* v. *Daniell*, 15 M. & W. 792. See *Burroughs* v. *M'Creight*, 1 J. & Lat. 290, and other authorities cited in the note to this section in Shelford's Real Prop. Statutes.

(*g*) Challis, R. P. 303; 2 Cruise, Dig. 373.

entireties," and of this tenancy there can be no severance (*h*) by the husband, for he cannot alien so as to bind the wife's right if she survives him (*i*). Husband and wife, being but one person in law, cannot take the estate by moieties, but both are seised of the entirety (*k*)—in other words, of the whole but not of a part; and therefore the one cannot dispose of any part without the other (*l*). They are said to be seised *per tout*, and not *per my et per tout* as joint tenants (*m*). It was a consequence of the doctrine that husband and wife are, for most purposes, one person, that, if an estate was conveyed to a husband and wife and a third party as joint tenants, the husband and wife together took a moiety only, instead of one third each, and the third party took the other moiety, in the same way as if the grant had been to two persons only (*n*). It appears to be the result of recent decisions, that in cases falling within the Married Women's Property Act, 1882 (*o*), husband and wife together still take only one aliquot share as against other joint tenants, on the ground that the Act does not affect the doctrine that husband and wife are one person; but that as between themselves they no longer take by entireties, and each therefore can sever the tenancy by alienation (*p*).

Release to joint tenant.

One joint tenant cannot properly convey his interest to another joint tenant by an assurance by which he could convey it to a stranger. The proper method is to convey it by a deed of release, an assurance which operates rather by extinguishing the right than by conveying any estate (*q*). And he to whom the release is made takes a fee simple without the word "heirs," because he is already seised *per my et per tout* of the fee and inheritance (*r*). It need hardly be said that there is no magic in words,

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(*h*) *Doe* v. *Parratt*, 5 T. R. 652.

(*i*) *Back* v. *Andrew*, 2 Vern. 120

(*k*) Co. Litt. 187*a*.

(*l*) Co. Litt. 326*a*.

(*m*) Notes to *Morley* v. *Bird*, Tudor, L. C. R. P. 900.

(*n*) Litt. s. 291. See *Re Dixon*, *Byram* v. *Tull*, 42 Ch. D. 306 (the case of a will where the testator died before the M. W. P. Act, 1882, came into operation).

(*o*) 45 & 46 Vict. c. 75.

(*p*) *Re March*, *Mander* v. *Harris*, 27 Ch. D. 166, reversing Chitty, J., 24 Ch. D. 222; *Re Jupp*, 39 Ch. D. 148. In *Re March* the will was made before the Act, and the decision of the C. A. was limited so as not to extend to wills made after the Act. In *Re Jupp*, Kay, J., dissented from the opinion of Chitty, J., in *Re March*, that husband and wife each take an aliquot share as against other joint tenants.

(*q*) For each joint tenant is seised of the whole. There could not therefore be livery of seisin as between them.

(*r*) Litt. s. 304; Elph. N. & C. Interp. 227.

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and that a deed of grant would operate as a release (s). By the Conveyancing and Law of Property Act, 1881 (t), in a deed executed after 1882 it is sufficient, in the limitation of an estate in fee simple, to use the words "in fee simple" without the word "heirs"; but the Act does not make it necessary to limit the estate where it was not necessary before.

Severance.

The incident of survivorship (or as it is called "*jus accrescendi*"), which is the consequence of the joint nature of the estate, is conditional on the estate remaining unchanged in its character at the death of one of the joint holders. For the joint nature of the interest in an estate held in joint tenancy does not preclude any holder from an alienation of his share, provided this be done in his lifetime; and the effect of an alienation to a stranger is a "severance" of the tenancy. The effect of this severance, destroying the joint tenancy, is to destroy at the same time the right of survivorship as to the share alienated: for the alienee no longer holds jointly with the other co-sharer, or co-sharers, but as a tenant in common with him or them; his title having a different origin, and commencing at a different time from his or theirs. If more than one of the original joint-tenants be left after such alienation, they still remain joint tenants as between themselves. Thus, suppose A., B., and C. to be joint tenants in fee in certain lands, and A. to alien his share, A.'s alienee would take one equal undivided third as tenant in common with B. and C., which on his death intestate would descend to his heir; but B. and C. would remain joint tenants in two undivided thirds, and on the death of either, no alienation having been made, the survivor of B. and C. would take the whole two-thirds. From the moment of severance, then, the only unity left as between the alienee and other co-tenants is that of possession (tt).

It is a condition of this severance, that it be effected by some act *inter vivos*. It cannot be effected by will, for the reason that a will takes effect upon the death of the testator, but, at the

(s) *Chester* v. *Willan*, 2 Wms. Saund. 96*a*.

(t) 44 & 45 Vict. c. 41, s. 51.

(tt) In *Caldwell* v. *Fellows*, L. R. 9 Eq. 410, and *Burnaby* v. *Equitable, &c., Society*, 28 Ch. D. 416, it was held that a covenant to settle property had the effect of severing a joint tenancy. But marriage does not of itself sever a joint tenancy between the wife and third persons, except as to such property as passes to and vests in the husband by the operation of law, upon the marriage, without any further act on his part; see *Re Butler's Trusts*, 38 Ch. D. 286, where the C. A. disapproved of the decision of Malins, V.-C., in *Baillie* v. *Treharne*, 17 Ch. D. 388.

instant of that death, his interest ceases and is transferred by virtue of the *jus accrescendi*, to the surviving joint tenants; so that at the time the will comes into operation, there is nothing left in the testator for the devise to operate upon. This is expressed by the maxim, *jus accrescendi præfertur ultimæ voluntati* (*u*).

Partition.

But not only may a joint tenant alienate his share, he may obtain a partition of the land, and an allotment to himself in severalty of some specific portion of the common property, commensurate in point of value with his share in the undivided whole. Originally, and at common law, he could do this only by the agreement of all the joint tenants, the law not permitting any to destroy the common possession without the consent of all (*v*); and it was necessary that conveyances by deed should be executed for the purpose of vesting in each party a several estate in the portion to be taken by him (*w*). But a contract by a joint tenant to sell, though it does not sever the joint tenancy at law, would sever it in equity (*x*).

Certain statutes of the reign of Henry VIII. (*y*) rendered partition compulsory by common law process at the instance of any joint tenant, who might sue out a writ for that purpose, called a "writ of partition." The process by writ of partition directed to the sheriff was practically superseded by the procedure authorized under the Act 8 & 9 Wm. III. c. 31 (*z*); and the writ of partition was abolished by 3 & 4 Wm. IV. c. 27, s. 36. Partition was also obtainable by a suit in equity (*zz*), and the jurisdiction in equity, originally concurrent, became exclusive after the above-mentioned Act of Wm. IV. Partition is now obtained by action in the Chancery Division of the High Court, or, where the property does not exceed £500 in value, in the County Court of the District (*a*). The partition may be made by means of a commission; but the usual course is to direct it to be made in chambers (*b*). By partition at law the legal estate was vested;

(*u*) Co. Litt. 185*b*.

(*v*) Litt. s. 290.

(*w*) Co. Litt. 169*a*: 187*a*; 2 Cruise, Dig. 384.

(*x*) *Brown* v. *Raindle*, 2 Ves. 257.

(*y*) 31 H. 8, c. 1; 32 H. 8, c. 32; see 2 Cruise, Dig. 384, as to the mode of proceeding under these statutes. And see *Miller* v. *Warmington*, 1 Jac. & W. 484.

(*z*) 2 Cruise, Dig. 386.

(*zz*) See Hargrave's note (2), s. vii., to Co. Litt. 169*a*; 2 Cruise, Dig. 388 (s. 42), *Agar* v. *Fairfax*, 2 W. & T. L. C., and notes.

(*a*) 31 & 32 Vict. c. 40, s. 12.

(*b*) See Pemberton on Judgments, 629, and Forms: Seton on Decrees, Forms at p. 1019 and notes at p. 1027.

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but where partition is made by agreement or by decree of the Court, mutual conveyances between the parties must be executed (*c*), which, as we have seen, should be in form releases, and under the Act to Amend the Law of Real Property they must be by deed (*d*).

But partition may be made also without conveyances through the Board of Agriculture (formerly called the Inclosure Commissioners, and afterwards the Land Commissioners), under numerous statutes (*e*), and this, being the cheaper method, is now more usually adopted.

Sale in lieu of Partition.

In cases where the Court can make a decree for partition, it now has power under the Partition Act, 1868 (*f*), at the request of any party interested, notwithstanding the dissent or disability of others, to direct a sale (*g*); and at the request of the party or parties interested, individually or collectively, to the extent of one moiety or upwards, it is bound to direct a sale of the property and distribution of the proceeds instead of a division of the property, "unless it sees good reason to the contrary" (*h*).

The necessity of conferring this power of sale upon the Court may be seen from consideration of the following case:—

Plaintiff was entitled to two-thirds of a house, and defendant to the other third; it was of great value to both parties; to the defendant as shopkeeper, and to the plaintiff as contiguous to other estates. Lord Eldon at first, out of mercy to the parties, let it stand over, proposing a reference as to the value, and to which party the option of buying or selling should be given; and afterwards he said, the difficulty was no objection in that Court. He was, therefore, of opinion that if the parties insisted upon having the law take its course, the commission to partition might proceed. The commission having been executed, an exception was taken by the defendant, on the ground that the commissioners had allotted to the plaintiff the whole stack of chimneys, all the fire-places, the only staircase in the house, and all the conveniences in the yard. But Lord Eldon overruled the exception, saying, he did not know how to make a better partition for the parties; that he granted the commission with great reluctance, but was bound by

(*c*) *Attorney-General* v. *Hamilton*, 1 Mad. 214; Seton on Decrees, 1028.

(*d*) 8 & 9 Vict. c. 106, s. 3. See form of agreement for Partition, 2 K. & E. 279, and forms of Deeds of Partition, in Dav. Conc. Prec. 380, and 2 K. & E. 286 *et seq.*

(*e*) See the form in 2 K. & E. 285, and the notes thereto.

(*f*) 31 & 32 Vict. c. 40 (amended by 39 & 40 Vict. c. 17). See Seton on Decrees, 1004 *et seq.*; Pemberton on Judgments, 638 *et seq.*

(*g*) 31 & 32 Vict. c. 40, s. 3. *Pitt* v. *Jones*, 5 App. Cas. 651; *Richardson* v. *Feary*, 39 Ch. D. 45.

(*h*) 31 & 32 Vict. c. 40, s. 4. See *Pemberton* v. *Barnes*, L. R. 6 Ch. 685; and *Porter* v. *Lopes*, 7 Ch. D. 358.

authority; and it must be a strong case to induce the Court to interpose, as the parties ought to agree to buy and sell (*i*).

Settled Land Act, 1882.

By the Settled Land Act, 1882 (*j*), a power to concur in partition is given to tenants for life and other limited owners generally in respect of settled lands, where the settlement comprises an undivided share in land, or, under the settlement, the settled land has come to be held in undivided shares (*k*). It is not therefore necessary now in ordinary cases that the settlement should contain an express power to concur in partition; but, if necessary, special powers can be added, which will operate as if conferred by the Act, unless a contrary intention is expressed in the settlement (*l*).

Severance by accession of interest.

Independently of either alienation or partition, a joint tenancy may also be destroyed by an accession of a new interest beyond that to which the joint tenancy applies. Therefore, if there be two joint tenants for life, and the inheritance is purchased by or descends upon either, it is a severance of the joint tenancy (*m*).

Trustees.

Covenants by and with joint tenants.

Trustees are always made joint tenants, and joint tenancy usually indicates trusteeship. In the case of a sale by trustees, the trustees only covenant that they have not encumbered, and the form of covenant is several—that is, each of them covenants so far only as relates to his own acts, &c. (*n*). Where the conveyance is by joint tenants as beneficial owners, they enter into the usual covenants for title, but also in the form of several covenants, confined to their own acts, &c.; for, if they were to covenant jointly, all would be liable for the acts of each, and the whole burden of the covenant would devolve on the survivors or survivor (*o*). Such covenants by joint tenants may now be shortened in form, by virtue of the Conveyancing and Law of Property Act, 1881. Thus, where each expressly conveys "as beneficial owner" as to his share, a several covenant will be implied; similarly, if all convey as beneficial owners, a joint covenant will be implied (*p*). But if the conveyance is to them and the covenants are entered into with them, the covenants should be with them jointly (*q*); and such will be the covenants for title

(*i*) *Turner* v. *Morgan*, 8 Ves. 143.

(*j*) 45 & 46 Vict. c. 38 (ss. 3 (iv.), 4, 19, 20, 31, 45).

(*k*) See *ante*, pp. 48 *et seq.*

(*l*) 45 & 46 Vict. c. 38, s. 57.

(*m*) 2 Bl. 186. The reason appears to be that in the case put in the text the estate for life in one moiety is destroyed by merger in the inheritance.

(*n*) See form, 1 K. & E. 634, v.

(*o*) See form, 2 Da. i. 359, note.

(*p*) 44 & 45 Vict. c. 41, ss. 7, 64, and see examples in 1 K. & E. 435 *et seq.*

(*q*) 1 Da. 112, 114; and 2 Da. i. 359,

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implied in a conveyance under the Conveyancing and Law of Property Act, 1881 (*r*).

III. Coparcenary.

The nature of an estate in Coparcenary is best explained in the words of Blackstone. He says (*s*) :—

"An estate held in coparcenary is where lands of inheritance descend from the ancestor to two or more persons. It arises either by common law, or particular custom. By common law: as where a person seised in fee simple or in fee tail dies, and his next heirs are two or more females, his daughters, sisters, aunts, cousins, or their representatives; in this case they shall all inherit, and these co-heirs are then called 'coparceners'; or, for brevity, 'parceners' only. Parceners by particular custom are where lands descend, as in gavelkind, to all the males in equal degree, as sons, brothers, uncles, &c. And, in either of these cases, all the parceners put together make but one heir; and have but one estate among them.

"The properties of parceners are in some respects like those of joint tenants; they have the same unities of interest, title, and possession. They may sue and be sued jointly for matters relating to their own lands: and the entry of one of them shall in some cases enure as the entry of them all. They cannot have an action of trespass against each other: but herein they differ from joint tenants, that they are also excluded from maintaining an action of waste; for coparceners could at all times put a stop to any waste by a writ of partition, but till the statute of Henry VIII., joint tenants had no such power. Parceners also differ materially from joint tenants in four other points: 1. They always claim by descent, whereas joint tenants always claim by purchase. Therefore, if two sisters purchase lands, to hold to them and their heirs, they are not parceners, but joint tenants (*t*), and hence it likewise follows, that no lands can be held in coparcenary, but estates of inheritance, which are of a descendible nature; whereas not only estates in fee and in tail, but for life or years, may be held in joint tenancy. 2. There is no unity of time necessary to an estate in coparcenary. For if a man hath two daughters, to whom his estate descends in coparcenary, and one dies before the other, the surviving daughter and the heir of the other, or, when both are dead, their two heirs, are still parceners; the estates vesting in each of them at different times, though it be the same quantity of interest, and held by the same title. 3. Parceners, though they have a unity, have not an entirety of interest. They are properly entitled each to the whole of a distinct moiety; and of course there is no *jus accrescendi*, or survivorship between them: for each part descends severally to their respective heirs though the unity of possession continues. And as long as the lands continue in a course of descent, and

note, and 421. As to the obligation thereby implied, see Conveyancing Act, 1881 (44 & 45 Vict. c. 41), s. 60, *ante*, p. 160.

(*r*) 44 & 45 Vict. c. 41, s. 7 (1).

(*s*) Vol. ii. p. 187; Litt. s. 241; Co. Litt. 163*a*; Challis, R. P. 301; 2 Cruise, Dig. 391.

(*t*) Litt. s. 254. Therefore, where in a settlement lands were limited to the right heirs of A. as purchasers, and A.'s heirs were three of his sisters and the daughters of a deceased sister, it was held that these daughters, having survived the three sisters, took the whole by survivorship: *Berens* v. *Fellowes*, 35 W. R. 356; 56 L. T. 391.

united in possession, so long are the tenants thereof, whether male or female, called parceners."

Partition.

"They are called parceners," says Littleton (*u*), "because by the writ the law will constrain them, that partition shall be made among them." This partition was at common law, and not, as in the case of joint tenants or tenants in common, under statutes (*v*), because, it was said, descent was the act of the law (*w*). At common law the partition might be by parol, and did not require an actual conveyance; for by partition the coparceners do not acquire their shares by purchase, but continue to be entitled by descent. For the same reason in case of the death of one coparcener intestate after partition, the heir is to be traced, not from such one as last purchaser, but as if no partition had been made (*x*). Partition or sale may now be obtained by action in the Chancery Division, or through the Board of Agriculture, as in the case of joint tenancy (*y*).

Like joint tenancy, coparcenary is destroyed by the destruction of the unity of the title. Thus an alienation by one coparcener destroys the coparcenary as to that one. Of course, in the event of the descent of the entirety of the land upon a single coparcener, that coparcener thenceforth holds in severalty (*z*).

Advowson (in whom right to present).

There is a peculiarity in reference to the estate of coparcenary as to an advowson, or the right of presentation to a living, that is, the appointment of a clergyman to an ecclesiastical benefice.

When an advowson descends to coparceners and they cannot agree to present, they present successively according to seniority; and this privilege extends not only to the heirs, but to the assignees of each coparcener, whether by conveyance or act of law; so that a tenant by the curtesy shall have the same turn as his wife would have had (*a*). And notwithstanding partition, each coparcener will present in turn, unless there has been an express exception, because in the case of coparceners, the severance by partition is said to take place by operation of law (*b*).

On the other hand, joint tenants and tenants in common must concur in a presentation, but if they present different clerks, the bishop may admit either or refuse both; but where a Protestant

(*u*) S. 241.
(*v*) Viz., of Hen. VIII. *Ante*, p. 249.
(*w*) Co. Litt. 163*b*.
(*x*) *Doe* v. *Dixon*, 5 Ad. & El. 834.
(*y*) *Ante*, pp. 249, 250.
(*z*) 2 Bl. 191.
(*a*) 2 Da. i. 38.
(*b*) *Fox* v. *Bishop of Chester*, Tudor L. C. R. P. 257.

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and a Roman Catholic are tenants in common, the right of presentation is in the Protestant alone. If tenants in common cannot agree in presentation they must draw lots for choice (c).

IV. Tenancy in common. Creation.

Tenancy in Common differs from coparcenary in that it cannot be created by descent, and, on the other hand, its only similarity, as regards the unities, to a joint tenancy is in its unity of possession. Thus Blackstone says (d) :—

"Tenants in common are such as hold by several and distinct titles, but by unity of possession; because none knoweth his own severalty, and therefore they all occupy promiscuously. This tenancy therefore happens where there is an unity of possession merely, but perhaps an entire disunion of interest, of title, and of time. For, if there be two tenants in common of lands, one may hold his part in fee simple, the other in tail, or for life; so that there is no necessary unity of interest: one may hold by descent, the other by purchase; or the one by purchase from A., the other by purchase from B.; so that there is no unity of title: one's estate may have been vested fifty years, the other's but yesterday; so there is no unity of time (e). The only unity there is, is that of possession; and for this Littleton gives the true reason, because no man can certainly tell which part is his own: otherwise even this would soon be destroyed."

It should be added that the shares of tenants in common may be unequal.

Common Law. Equity.

It has been said that, while the common law was in favour of a joint tenancy, equity favoured tenancy in common. The following case (f) relates to personal property, but the same principles apply to realty:—A. by will gave all his property to his daughter I. on condition that she paid to the four daughters of his brother J. "four hundred pounds out of seven, now lying in the £3 per Cent. Consolidated." It was held, that the legacy to the four daughters, being without words of severance, created a joint tenancy therein, and that the whole survived to M., the surviving daughter. In giving judgment, Sir R. P. Arden, M.R., said:—

"Great doubts have been entertained by Judges, both at law and in equity, as to words creating a joint tenancy or a tenancy in common; and it is clear the ancient law was in favour of a joint tenancy; and that law still prevails: unless there are some words to sever the interest taken, it is at this moment a joint tenancy, notwithstanding the leaning of the Courts lately in favour of a tenancy in common. A legacy of a

(c) *Ib.* 263 *et seq.*

(d) Vol. ii. p. 191; Co. Litt. 188*b*; Challis, R. P. 297; 2 Cruise, Dig. 399.

(e) Tenancy in common may be by prescription; Litt. s. 310.

(f) *Morley* v. *Bird*, 3 Ves. 629; and Tudor L. C. R. P. 876.

specific chattel, a grant of an estate, is a joint tenancy. It is true, the Courts, seeing the inconvenience of that, have been desirous, wherever they could find any intention of severance, to avail themselves of it: and their successive determinations have laid hold of any words for that purpose. 'Equally to be divided,' 'equally, among, between,' even in law I believe, certainly in equity, create a tenancy in common; but without those words it is a joint tenancy" (*g*).

And again, in another case previously referred to (*h*), Page-Wood, V.-C., stated:—

"It was said that the inclination in equity has been to favour tenancies in common and not joint tenancies. The Court has so far done this as to say, that, where it finds slight words of intention of severance, the course is to act upon them; but where the words are such as to create a joint tenancy, that must be taken to be the real intent of the conveyance, unless there is some distinct ground to prevent its operation."

Form of creation by deed.

The usual mode of creating a tenancy in common by deed is to limit the estate to two or more persons "as tenants in common" (*i*)—*e.g.*, to A. B. and C. D. their heirs and assigns as tenants in common. Now that, under the Conveyancing and Law of Property Act, 1881, it is not necessary to express words of inheritance, but "in fee simple" or "in tail" are sufficient, the form may be—to A. B. and C. D. in fee simple (or in tail) as tenants in common (*j*).

Cross remainders (*k*).

When lands are given in undivided shares to two or more persons for particular estates, so as that, upon the determination of the particular estates in any of those shares, they and the accruing shares remain over to the other grantees, and the remainderman or reversioner is not let in till the determination of all the particular estates; then the grantees take their original shares as tenants in common, and the remainders limited among them, on failure of the particular estates, are known by the appellation of "cross-remainders." But no technical words are required to create cross-remainders: any words which sufficiently indicate the intention of the parties will be sufficient for the purpose (*l*).

The following form is frequently found in strict settlements:

(*g*) Generally as to what words create a joint tenancy by deed or will, and what a tenancy in common, see notes to *Morley* v. *Bird*, Tud. L. C. R. P. 876.

(*h*) *Kenworthy* v. *Ward*, 11 Hare, 204; *ante*, p. 244.

(*i*) 2 Da. i. 333.

(*j*) 44 & 45 Vict. c. 41, s. 51.

(*k*) Elph. Introd. 344; Challis, R. P. 299.

(*l*) 4 Cruise, Dig. 298; and see Co. Litt. 195*b*.

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the property is conveyed to the trustees to the use of A. (the settlor) for life, and after his death to uses in favour of his sons, with remainder—

"To the use of all the daughters of the said A. and the heirs of their respective bodies in equal shares as tenants in common. And if there shall be a failure of issue of any such daughter, then as well as to her original share as to any share or shares which shall have accrued to her or to the heirs of her body by virtue of this present limitation To the use of the others of such daughters and the heirs of their respective bodies in equal shares as tenants in common And if there shall be a failure of issue of all such daughters but one, or if there shall be but one such daughter, then as to the entirety of the same premises To the use of such one or only daughter and the heirs of her body" (*m*).

It is a fundamental rule that cross-remainders cannot be implied in a deed (*n*), but in a will they may be raised by implication, on the ground that, the testator being *inops concilii*, by construction his words ought to be made to answer his intent appearing in other parts of the will as near as may be (*o*).

Partition. Dower. Curtesy.

What has been said in respect of partition of a joint tenancy applies equally to a tenancy in common. But lands held in common, unlike those in joint tenancy, are subject to dower and curtesy.

Covenants by and with tenants in common.

Reference has been made to the covenants for title usually entered into by joint tenants on a sale of lands by them. Tenants in common enter into similar covenants, but with this difference in form, that they are expressed to be "so far only as relates to the (*e.g.*) one equal undivided fourth share of which he claims to be seised and to his own acts, &c." (*p*). When the tenants in common are covenantees, the covenants should be entered into with them severally (*q*); and such will be the covenants for title implied in a conveyance under the Conveyancing and Law of Property Act, 1881 (*r*).

Joint tenants and tenants in common. Waste. Repairs.

By the Statute of Westminster the Second (*s*) the action of waste was given to one tenant in common of the inheritance against another making waste in the estate held in common. The equity of this statute, it was said, extended to joint tenants but not to

(*m*) See 2 K. & E. 585 (cl. xix.); and *ibid* 807 (cl. xiv.)

(*n*) Elph. N. & C. Interp. 289.

(*o*) See Co. Litt. 195*b* (Butler's note); and notes to *Gardner* v. *Sheldon*, Tudor L. C. R. P. p. 656.

(*p*) See 1 K. & E. 431, 435, 458. *Ante*, p. 251.

(*q*) 1 Da. 117; and see form 2 Da. i. 333.

(*r*) 44 & 45 Vict. c. 41, s. 7 (1).

(*s*) 13 Ed. I. c. 22.

coparceners, because by the old law they might make partition, and thereby prevent future waste, but tenants in common and joint tenants could not; and therefore the statute gave them this remedy, compelling the defendant either to make partition, and take the place wasted to his own share, or to give security not to commit any further waste (*t*). As between tenants in common or joint tenants, a Court of Equity will not grant any injunction against committing waste, unless the waste be what is called voluntary, that is, positive and actual destruction, as cutting trees not fit to cut (*u*); and one tenant in common (it has been decided, and doubtless a joint tenant) may get, or license another to get, minerals under the property; only he must not appropriate to himself more than his proper share of the proceeds, which is matter of account, and that is the only remedy which will be granted (*x*). Under the Judicature Act, 1873 (*y*), such account must be obtained in the Chancery Division of the High Court; this provision practically repeals 4 Anne, c. 16, s. 27, which gave a right of action of account to one co-tenant against another. And one tenant cannot maintain an action against a co-tenant for a contribution to the cost of repairs, where the money expended has been for ordinary repairs and not such as were absolutely necessary for the prevention of ruin (*z*)

The possession and seisin of one tenant in common was formerly accounted to be the possession and seisin of the others (*a*); but this is no longer the case since the Act 3 & 4 Wm. 4, c. 27 (*b*).

(*t*) 2 Inst. 403, 404; Co. Litt. 200*b*.

(*u*) *Twort* v. *Twort*, 16 Ves. 131. *Ante*, p. 39.

(*x*) Co. Litt. 172*a*, 200*b*; *Job* v. *Potton*, L. R. 20 Eq. 84.

(*y*) 36 & 37 Vict. c. 66, s. 34, § 3.

(*z*) *Leigh* v. *Dickeson*, 12 Q. B. D. 194; 15 Q. B. D. 60.

(*a*) See 2 Cruise, Dig. 402.

(*b*) S. 12, set out on p. 246, *ante*.

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CHAPTER X.

USES AND TRUSTS.—EXECUTORY INTERESTS.

WE now proceed to a subject to which occasional reference has already been made, and which occupies a prominent place in the English law of real property, viz., the Statute of Uses (27 Hen. VIII., c. 10).

I. The law before Statute of Uses.

Seisin—Legal estate.

A clear understanding of the nature and meaning of a legal "seisin," and of the distinction between "legal" and "equitable" estates is essential to the just apprehension of this subject.

The only estates of freehold recognised by the common law were estates for life, estates in fee simple, and, after the Statute *De Donis*, estates tail (*a*). An estate of freehold in possession could only be created or transferred by "livery of seisin," *i.e.*, actual delivery of the possession of the land. This was generally effected by what is called a "feoffment" (*aa*), *i.e.*, the person in possession of the land actually delivered a sod of turf or a piece of thatch of a house, as representing all the land, to the person to whom the land was to be conveyed. The conveyance might also be made by fine (*b*) or recovery (*c*). These were fictitious actions, the last stage of which was livery of seisin made by the sheriff to the person to whom the land was to be conveyed.

It will be observed that the transfer of the ownership was always open and notorious. The object of this notoriety, it has been said, was, that the lord might always know to whom he might apply for the services due from the tenant, and for the profits arising from such incidents of tenure, as aids, reliefs, heirships, descents, or forfeitures (*d*).

Courts of Common Law.

The Common Law Courts of England recognised in relation to land no other ownership than that which was either conferred

(*a*) *Ante*, p. 61.

(*aa*) See *post*, p. 351. As to livery of seisin, see Co. Litt. 48*a*. The King did not convey by feoffment, but by grant entered of record; *Case of the Dutchy*, Plowd. at p. 213.

(*b*) 5 Cruise, Dig. tit. xxxv.; *ante*, p. 65.

(*c*) 5 Cruise, Dig. tit. xxxvi.; *ante*, p. 64.

(*d*) Notes to *Tyrrell's Case*, Tudor L. C. R. P. 336.

originally by livery of seisin by the lord, or transferred from one tenant to another by the same solemnity (*e*). Though the person seised in possession (called the "terre-tenant") were seised for another beneficially; though he had even sold his interest to another for a valuable consideration; though he had acknowledged that he held the estate not for his own use but for another; still, so long as the actual seisin remained in him, without having been divested by the requisite formal assurance, whether feoffment, fine or recovery, the Common Law Courts treated the estate as vested in him alone, and not only refused to inquire whether there was an interest in the land in any other person, but would even shut their eyes to its existence when shown. To such a length indeed was this carried, that if the beneficial owner, for whose benefit the estate was held by the terre-tenant, had acquired possession of the land without livery being made to him, he would be treated as a mere trespasser as against the person seised; while, if out of possession, he would be regarded as an entire stranger (*f*).

Court of Chancery.

There arose (*g*) in process of time another Court with a jurisdiction called an equitable jurisdiction, beyond that of the ordinary Common Law Courts, namely, the Court of Chancery. This Court recognised the beneficial interest, and gave effect to it by calling upon the terre-tenant to discharge the obligation under which he held the land; but, notwithstanding the establishment of this equitable jurisdiction, the Courts of Common Law still pursued their ancient course, and recognised only the legal seisin, leaving the beneficial interest to be dealt with in the Court of Chancery.

The result was that a person in possession of land, to which he had a perfectly good title in equity, was liable to lose it by an action at law. If A. was seised in trust for B., and B. was in possession, A. could, by an action at law, recover the land from B. On the other hand a person, whose title was perfectly good at law, might be compelled by a suit in Chancery to deal with his estate for the benefit of the equitable owner. In order to mitigate to some extent this inconvenience, there sprang up the practice of granting an injunction in Chancery at the suit of the equitable owner, restraining the legal owner from ejecting him

(*e*) A term of years, which could be created or transferred without livery, was not originally an estate at common law; Challis, R. P. 46; *ante*, pp. 16: 150.

(*f*) 2 Bl. 328.

(*g*) See Kerly, Historical Sketch, 6.

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by action at law, or sometimes of allowing the common law action to proceed on the terms that the plaintiff, if successful, should deal with the land as the Court of Chancery should direct. This was only an order binding the defendant personally, so that he might be committed to prison if he disobeyed it; but it in no way affected the power or jurisdiction of the Courts of Common Law.

For some centuries immediately preceding the Judicature Act the ordinary action at common law for the recovery of land was an "ejectment" (*h*). In this action the only question considered was, who had the right at law to the possession. The plaintiff could only succeed by showing that he had at law a right to the possession, and, if his title was merely equitable, he could not show this. The rule was even carried so far that the person in possession could, except where a landlord brought ejectment against his tenant, make a perfectly good defence by showing that the legal right to the possession was in a stranger.

Equitable estate.

It is only the ownership recognised in the Courts of Common Law, which is termed the "legal estate." The beneficial ownership, recognised in a Court of Equity only, is termed the "equitable estate."

Thus, let us suppose A., seised of the legal estate, to have executed a declaration acknowledging in the plainest terms that, though the legal estate was in him, yet the property belonged in fact to B., and that he, A., only held as a trustee for B.; yet if B., wrongfully kept out of possession by A., brought an action in a Court of Common Law for the recovery of the land (and the action of ejectment would have been the ordinary one for the purpose), the action would necessarily have failed, because the legal estate, to which the common law would attach the right of possession, would be in A., and not in B., and the acknowledgment of the trust would have been disregarded. B.'s only remedy would have been in equity; and even then, all that the Court of Chancery could have done would have been, not to award the possession to B., but to direct A. to place B. in his, A.'s, own position—namely, to order him to execute a conveyance of the estate to B. or as he should direct, and to account to him for the mesne profits; and it would not have been until after this conveyance to B. had been executed, and B. had by its means

(*h*) *Ante*, p. 7; 3 Bl. ch. 10, and Form in Appendix.

obtained the legal ownership or estate, that he could have proceeded with effect in a court of common law to recover the possession. The practical result was that B. could exercise most of the rights of an owner, while A. remained liable to perform the services by which the land was held.

The nature of these two estates, legal and equitable, is well described by Mr. Hayes (*i*):—

"Thus, there existed two distinct kinds of proprietorship, the subjects of distinct modes of alienation, and the objects of distinct jurisdictions. The vulgar notion of 'Equity' is that of a mild and liberal tribunal, tempering the austerity of the law. The correct legal notion, with reference to the subject before us, is that of a judicature peculiar in its constitution, searching the conscience, and acting against the person of an individual intrusted with the keeping of the land, as distinguished from a judicature consulting the common law, and awarding possession of the land itself."

High Court.

By the Supreme Court of Judicature Act, 1873 (*k*), the jurisdictions, both of the Courts of Common Law and of the Court of Chancery, were transferred to the High Court of Justice, and it was enacted that:—

S. 25, § 11. "Generally in all matters, not hereinbefore particularly mentioned, in which there is any conflict or variance between the rules of equity and the rules of the common law with reference to the same matter, the rules of equity shall prevail."

As to County Courts, the Judicature Act, 1873 (*l*), provides as follows:—

S. 89. "Every inferior court which now has, or which may, after the passing of this Act, have jurisdiction in equity, or at law and in equity, and in admiralty respectively, shall, as regards all causes of action within its jurisdiction for the time being, have power to grant, and shall grant in any proceeding before such Court, such relief, redress, or remedy, or combination of remedies, either absolute or conditional, and shall in every such proceeding give such and the like effect to every ground of defence or counterclaim, equitable or legal (subject to the provision next hereinafter contained), in as full and ample a manner as might and ought to be done in the like case by the High Court of Justice."

Use.

The purpose for which property was held by the feoffee for the

(*i*) Popular View of the Law of Real Property, p. 26.

(*k*) 36 & 37 Vict. c. 66, s. 25, § 11.

(*l*) 36 & 37 Vict. c. 66, s. 89.

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benefit of another, was termed a "use." The personal nature of the use is pointed out by Lord Coke who defines it as:—

"A trust or confidence which is not issuing out of land, but as a thing collateral annexed in privity to the estate and to the person touching the land; *scil.*, that *cestui que use* shall take the profits, and that the tertenant [*i.e.*, the feoffee] shall make estates according to his direction. So that he who hath an use hath not *jus neque in re neque ad rem*, but only a confidence and trust, for which he hath no remedy by the common law, but his remedy was only by subpœna in Chancery. If the feoffees would not perform the order of the Chancery, then their persons, for the breach of the confidence, were to be imprisoned till they did perform it" (*m*).

The severance of the actual from the nominal ownership, coupled with the resolute ignoring on the part of the Common Law Courts of all else than the legal seisin, gave rise to great mischiefs, and to much contravention of the general policy of the law.

Origin of Uses. Mortmain (*n*).

One of the earliest instances, and possibly the origin, of the system of uses, was a device which was employed to evade the Statutes of Mortmain (*o*). The clergy, finding themselves incapacitated by these statutes from taking from pious benefactors direct grants of lands, had resort to the contrivance of having conveyances made to a third person "to the use of" or in "trust for" themselves. Though incapacitated from acquiring a legal ownership of the property, the clergy thus secured to themselves the enjoyment of it. In the particular instance of the clergy the device was crushed almost in its infancy by the Statute of Richard II., which enacted that for the future uses should be subject to the Statutes of Mortmain, and forfeitable like the lands themselves, unless a licence from the Crown to hold them were obtained (*p*). But the device thus invented by the clergy was adopted by laymen (*q*).

To avoid attainder.

So, again, in the civil commotions which were rife in the earlier periods of English history, a wholesale forfeiture for treason was

(*m*) *Chudleigh's Case*, Co. Rep. 121*b*; cp. Co. Litt. 272*b*; see Tudor L. C. R. P., notes to *Tyrrell's Case*, 337. The word "collateral" means having no connection with. "*Jus in re*" means particular rights over. "*Jus in rem*" means the right to have the land conveyed to him; Elph. Introd. 19; Campb. Stud. Aust. 183.

(*n*) Kerly, Historical Sketch, 78. See also as to the origin and nature of uses, Leake, Dig. of Law of Prop. in Land, pt. i. ch. iii. pp. 99 *et seq.*

(*o*) As to mortmain, see *ante*, p. 85.

(*p*) *Ante*, p. 88.

(*q*) As to the device of a feoffment to uses which enabled land to be devised, see pp. 377, 378.

the general result of the success of one of the two great contending parties over the other. Those, therefore, who took part in these struggles, would take the precaution, before they engaged in the strife, of preventing the consequences of a forfeiture for treason, by conveying their lands to others, who would nevertheless hold them to their use, and were called "feoffees to uses."

Burdens of tenure.

This mode of dealing with the land was also found a convenient way of avoiding the ordinary burthens of tenure, and sometimes, too, of defeating even the claims of execution creditors; for, says Mr. Hayes:—

"The use being the creature of conscience, the offspring of moral obligation, could not be the subject of 'tenure'; it could yield no fruits, and owe no duties to the lord, it was not liable to forfeiture, nor susceptible of livery (*r*)

* * * * * *

"So ready a method of eluding the yoke of 'tenure' could not but prove highly valuable to the people struggling with the narrow doctrines of the common law, and groaning under the oppression of wardships, marriages, reliefs, escheats to the lord, escheats to the Crown on attainder, and other feudal inflictions—all of which were evaded by this subtle invention (*s*). * * * *

"As it neither required, nor admitted, of a conveyance, it might be disposed of by a secret contract, and even by word of mouth" (*t*).

And, says Blackstone (*u*):—

"A use could not be extended (*v*) by writ of *elegit*, or other legal process, for the debts of *cestui que use*. For, being merely a creature of equity, the common law, which looked no farther than to the person actually seised of the land, could award no process against it."

But on the other hand, the beneficiary was often exposed to the loss of his estate from causes over which he had no control. For, as Blackstone (*x*) tells us:—

"Originally it was held that the Chancery could give no relief, but against the very person himself intrusted for *cestui que use*, and not against his heir or alienee. This was altered in the reign of Henry VI., with respect to the heir; and afterwards the same rule, by a parity of reason, was extended to such alienees as had purchased either without a valuable consideration or with an express notice of the use. But a purchaser for a valuable consideration, without notice, might hold the land discharged of any trust or confidence. And also it was held, that neither

(*r*) Hayes, Popular View, &c., 22.

(*s*) *Ib.* 29.

(*t*) *Ib.* 31; see Butler's note (sect. v. 11) to Co. Litt. 191*a*.

(*u*) Vol. ii. 331.

(*v*) That is, taken in execution: as to *Elegit*, see *post*, p. 369.

(*x*) Vol. ii., 329.

the king nor queen, on account of their dignity royal, nor any corporation aggregate, on account of its limited capacity, could be seised to any use but their own; that is, they might hold the lands, but were not compellable to execute the trust. And, if the feoffee to uses died without heir, or committed a forfeiture, or married, neither the lord who entered for his escheat or forfeiture, nor the husband who retained the possession as tenant by the curtesy, nor the wife who was assigned her dower, were liable to perform the use; because they were not parties to the trust, but came in by act of law: though doubtless their title in reason was no better than that of the heir."

Uses, how created.

Expressly.

The ordinary mode of creating a use was by conveyance, made by feoffment or fine, to a stranger in fee simple, with a direction, either oral, or expressed by deed, that he was to stand seised of the lands to the uses indicated. Sometimes uses were created by the declaration of the person seised of the land without any conveyance being made; but in this case, where the seisin is not changed, no use (at all events since the Stat. of Uses) can be created without the consideration of money, money's worth, blood or marriage (*z*). It should be noted that the declaration of use need not be made at the same time as the conveyance; it may be made either before or after it, and when the conveyance was effected by fine this was necessarily the case.

By implication.

But uses sometimes arose, not by express creation, but by legal implication. If, for example, A. made a feoffment to B. in fee simple without consideration and without any declaration of use, there was a resulting use to A. in fee simple. But this was not the case if B. took for life or in tail, or if (before the Statute of *Quia Emptores*) B. took in fee simple to hold of A.; for the tenure created in either of these cases between A. and B. was sufficient to show that B. was intended to take beneficially, *i.e.*, to take the use. Again, if A. made a feoffment to B. in fee simple, and uses were declared that did not exhaust the fee simple, so much of the use as was undisposed of resulted to A. (*a*).

Equity following, and not following, the law.

In dealing with uses, when relief was sought in the Court of Chancery, the principle was generally to assimilate the equitable to the legal ownership, and to treat the legal ownership as practically held for the benefit of the real beneficiary. Thus, uses were descendible according to the rules of the common law, or of the local custom, in the same manner as the legal estate in the land. But concurrently with this, the Court of Chancery so far

(*z*) Elph. N. & C. Interp. 149.

(*a*) Elph. N. & C. Interp. 286 *et seq.*

at times contravened the principles of the common law, that it disregarded some of the stricter rules as to the legal seisin, and allowed, as incidents of the equitable ownership, limitations of interests not only not recognised by, but at variance with, the stricter rules of the common law. Some instances of such equitable interests will be discussed hereafter.

Consequent inconveniences.

Though uses had an equitable beginning, yet, "like all new models of general schemes of ordering of property," they introduced so many unforeseen inconveniences, that Lord Bacon complained that—

"This course of proceeding was turned to deceive many of their just and reasonable rights. A man, that had cause to sue for land, knew not against whom to bring his action, or who was the owner of it. The wife was defrauded of her thirds; the husband of his curtesy; the lord of his wardship, relief, heriot, and escheat; the creditor of his extent for debt; and the poor tenant of his lease" (*b*).

Partial remedies.

For some of the inconveniences pointed out partial remedies had, prior to the Statute of Uses, been afforded by particular statutes. Some of these allowed the lands to be attached by the creditors of the *cestui que use;* others allowed actions to be brought against him if in actual possession, that is, in the "pernancy," or enjoyment of the profits; and some made him liable to actions of waste, established conveyances and leases made with the concurrence of the feoffee, and gave to the lord the wardship of the heir (*c*).

These, however, were but partial and imperfect remedies; still their provisions all pointed to the treating the *cestui que use* as the real owner of the estate, and a statute passed on the accession of King Richard III., furnished a hint for their extension, afterwards carried out by the Statute of Uses. King Richard, when Duke of Gloucester, had been a feoffee of lands to the use of other parties to a large extent, which lands, on his assumption of the Crown, he would (as the law was then understood) have been entitled to hold to himself discharged from the uses. To obviate this, an Act was passed, which ordained that where he had been so enfeoffed jointly with other persons, the lands should vest in the other feoffees, as if he had never been named; and that where he stood solely enfeoffed, the estate should vest in the *cestui que use,* in like manner as he had the use (*d*).

(*b*) 2 Bl. 331.
(*c*) *Ib.* 332.
(*d*) 2 Bl. 332; 1 Ric. III. c. 1; 1 Sanders on Uses, 23.

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The latter provision furnished the principle for, and was more amply carried out by the celebrated Statute of Uses, which passed in the 27th year of the reign of Henry VIII., the object of which statute evidently was, by uniting the legal seisin or interest to the equitable or beneficial interest, entirely to abolish the doctrine of Uses and Trusts (*e*).

II. Statute of Uses.

By that statute, after reciting in the preamble the various inconveniences pointed out above (*f*), it was enacted:—

S. 1. "That where any person or persons stand or be seised, or at any time hereafter shall happen to be seised, of and in any honours, castles, manors, lands, tenements, rents, services, reversions, remainders, or other hereditaments, to the use, confidence, or trust of any other person or persons, or of any body politic, by reason of any

(*e*) 27 Hen. VIII. c. 10. See Tudor L. C. R. P., notes to *Tyrrell's Case*, p. 340.

(*f*) The preamble is as follows:—"Where by the Common Laws of this realm, lands, tenements, and hereditaments, be not devisable by testament, nor ought to be transferred from one to another but by solemn livery and seisin, matter of record, writing sufficient made *bonâ fide* without covin or fraud; yet, nevertheless, divers and sundry imaginations, subtle inventions, and practices have been used, whereby the hereditaments of this realm have been conveyed from one to another by fraudulent feoffments, fines, recoveries, and other assurances, craftily made to secret uses, intents, and trusts; and also by wills and testaments sometime made by *nude parolx*, and words, sometime by signs and tokens, and sometime by writing; and for the most part made by such persons as be visited with sickness, in their extreme agonies and pains, or at such time as they have had scantly any good memory or remembrance, at which times they being provoked by greedy covetous persons, lying in a wait about them, do many times dispose indiscreetly and unadvisedly their lands and inheritances; by reason whereof, and by occasion of which fraudulent feoffments, fines, recoveries, and other like assurances to uses, confidences, and trusts, divers and many heirs have been unjustly, at sundry times, disherited, the lords have lost their wards, marriages, reliefs, harriots, escheats, aids *pur fayre fitz chyvaler*, and *pur file maryer*, and scantly any person can be certainly assured of any lands by them purchased, nor know surely against whom they shall use their actions, or executions, for their rights, titles, and duties; also men married have lost their tenancies by the curtesie, women their dowers; manifest perjuries by trial of such secret wills, and uses, have been committed; the king's highness hath lost the profits and advantages of the lands of persons attainted, and of the lands craftily put in feoffment to the uses of aliens born, and also the profits of waste for a year and a day of lands of felons attainted, and the lords their escheats thereof; and many other inconveniences have happened, and daily do increase among the king's subjects, to their great trouble and inquietness, to the utter subversion of the ancient common laws of this realm; for the extirping and extinguishment of all such subtle practised feoffments, fines, recoveries, abuses, and errors heretofore used and accustomed in this realm, to the subversion of the good and ancient laws of the same, and to the intent that the king's highness, or any other his subjects of this realm, shall not in anywise hereafter, by any means or inventions be deceived, damaged, or hurt by reason of such trusts, uses, or confidences."

bargain, sale, feoffment, fine, recovery, covenant, contract, agreement, will, or otherwise, by any manner of means whatsoever it be, that in every such case all and every such person and persons and bodies politic, that have or hereafter shall have any such use, confidence, or trust in fee simple, fee tail, for term of life, or for years or otherwise, or any use, confidence, or trust in remainder, or reverter, shall from henceforth stand, and be seised, deemed, and adjudged in lawful seisin, estate, and possession, of and in the same honours, castles, manors, lands, tenements, rents, services, reversions, remainders, and hereditaments, with their appurtenances, to all intents, constructions, and purposes in the law, of and in such like estates, as they had or shall have in use, trust, or confidence, of or in the same; and that the estate, right, title, and possession, that was in such person or persons that were or shall be hereafter seised of any lands, tenements, or hereditaments to the use, confidence, or trust of any such person or persons, or of any body politic, be from henceforth clearly deemed and adjudged to be in him or them, that have or hereafter shall have such use, confidence, or trust, after such quality, manner, form, and condition, as they had before in or to the use, confidence, or trust that was in them" (*g*).

Cestui que use to be seised for same estate as he had in the Use.

Estate and possession of person seised to be in *cestui que use.*

Thus, under a feoffment to A. to the use of B., the statute enacts that B. shall have the seisin and possession, and then declares that A.'s legal estate and possession shall be deemed and taken to be in B. for such estate as B. had previously in the use (*h*).

"The statute," says Blackstone (*i*), "thus 'executes' the use; that is, it conveys the possession to the use, and transfers the use into possession: thereby making the *cestui que use* complete owner of the lands and tenements as well at law as in equity."

Construction of statute.

1. Applies only to one seised of real estate.

It will be observed that the statute, in defining the class of persons holding property to the use of other persons, speaks only of a person or persons "seised." Now "seisin" is an expression applicable only to real estate, and as to personalty, "possession" and not "seisin" is the appropriate and recognised expression (*j*). The statute was therefore, very early after its introduction, held to be applicable only to cases in which there was a person "seised," that is, holding an estate of freehold, whether for life or of inheritance; and consequently if A. was possessed of a term of years, held by him in trust for or for the use of B., the statute did not apply, and the term remained vested in A., notwithstanding the statute, in the same way as it would have done before it. But a person might stand seised of the freehold to the use of another for a

(*g*) Revised Statutes. And see Sanders on Uses, p. 71.

(*h*) Watkins, Conv. 231, note.

(*i*) Vol. ii. 333.

(*j*) See *ante*, p. 144, as to the wider meaning of "seisin" in ancient times.

chattel interest—as if A. B., being seised in fee, covenanted to stand seised to the use of C. D., for a term of years; this use would be executed by the statute (*k*).

2. And to the use of another.

Another peculiarity should also be pointed out, namely, that the statute mentions only the instance in which the legal seisin is in one person, and the use, or beneficial ownership, in another, not when they are united in the same individual,—in the language of the statute, "where any person or persons stand or be seised, &c., to the use, &c., of any other person." Therefore, where a person is seised to his own use, the statute does not apply, but he is in by the common law (*l*). But, even in this case, if the estate declared in his favour by the use is less than the estate which he takes at common law, the uses are executed by the Statute (*m*). For example, if a feoffment be made to A. and his heirs, to the use of A. and his heirs, A. is in at common law, not by the Statute. But if the feoffment be to A. and his heirs to the use of A. for life, with remainder to B. in fee, both A. and B. are in by the Statute. And so, if the feoffment be to A. to the use of A. and B., both A. and B. are in under the Statute (*mm*).

Conveyance unto and to the use of grantee.

Notwithstanding this, it is customary to convey "unto and to the use" of the grantee, for the following reasons, as expressed by Mr. Davidson:—

"Where there is on the face of the conveyance a consideration expressed for it, a limitation to the purchaser and his heirs without any declaration of a use, will confer a fee simple; but before the Statute of Uses the rule was, that any conveyance made to another without any consideration or any declaration of a use, should be deemed to be made to the use of the party conveying; and it has been supposed that this rule has not been altered by the statute. In order to avoid any such construction, and to prevent the Statute of Uses from immediately undoing all that has been done, it is usual in every conveyance, and whether made for a consideration or not, to limit the land to the use of the purchaser, his heirs and assigns, or to such uses as he shall appoint, and in default of appointment to uses which practically vest the fee simple in him" (*n*).

The statute enabled a man to convey to himself a freehold in severalty or in joint tenancy, or to convey to his wife (which at common law, she being considered one person with him, he could not do), and a wife to convey to her husband; this is effected by

(*k*) Watkins, Conv. 233.

(*l*) *Peacock* v. *Eastland*, L. R. 10 Eq. 17; *Orme's Case*, L. R. 8 C. P. 281; *post*, p. 279.

(*m*) Elph. N. & C. Interp. 268; Challis, R. P. 314.

(*mm*) *Lowcock* v. *Overseers of Broughton* 12 Q. B. D. 369.

(*n*) 2 Da. i. 182.

Conveyance by a man to the use of himself, &c.

conveying to another person to the use of the person or persons intended to take, *e.g.*, where a man settles land upon himself for life, or where a surviving trustee conveys the trust estate to a new trustee jointly with himself. Says Mr. Davidson (*o*):—

"The interposition of a stranger as a grantee to uses enables a man to convey a freehold estate to himself or his wife, and a wife to convey a freehold estate to her husband; whereas, previously to the Statute of Uses, in consequence of the rule of the common law, that a man cannot take an estate by his own conveyance—*i.e.*, unite the opposite characters of grantor and grantee, two conveyances would have been necessary. It would have been requisite for him to convey to a third person, and for that third person to reconvey it to him: a method which, prior to the Act 22 & 23 Vict. c. 35, s. 21, was necessarily adopted under similar circumstances with respect to leasehold estates, since they are not affected by the Statute of Uses. The practical benefit thus derived from the Statute of Uses is seen in the familiar instances of a man settling his own freehold on himself for life or in tail, and of a surviving trustee limiting the estate to the use of himself and new trustees."

Conveyancing Act, 1881.

It is provided by the Conveyancing and Law of Property Act, 1881 (*p*), that freehold land (*q*) may, by a conveyance made after 31st December, 1881, "be conveyed by a person to himself jointly with another person by the like means by which it might be conveyed by him to another person; and may in like manner be conveyed by a husband to his wife, and by a wife to her husband, alone or jointly with another person."

3. And use co-extensive with feoffee's estate.

—*Scintilla juris.*

The *cestui que use* cannot have an estate in the use more extensive than the seisin out of which it is raised. Thus, if land be conveyed to A. for life, to the use of B. for life, in tail, or in fee, the estate of B. must determine upon the death of A. (*r*). Hence arose much controversy on the question out of what seisin contingent uses were in certain cases to be executed; as, for instance, where there was a conveyance to A. and his heirs to the use of the settlor and his heirs till an intended marriage, and after that marriage to other uses, *e.g.*, to the use of his son for life with remainders over. In such a case the use until the marriage is co-extensive with the seisin of A., the grantee to uses, and is executed by the statute, and so it would seem that no seisin could remain in him after the marriage; it was said, however, that

(*o*) Vol. ii. pt. i. 184.

(*p*) 44 & 45 Vict. c. 41, s. 50.

(*q*) Chattels real were made assignable by one person to another jointly with himself, by 22 & 23 Vict. c. 35, s. 21.

(*r*) Sanders on Uses, p. 107; Elph. N. & C. Interp. 270 (Rule 101).

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the original seisin reverted to him for the purpose of serving the secondary uses, and that before such event this possibility of reverter of the original seisin should be considered as a "possibility of seisin" or *scintilla juris* (*s*). Others held that the seisin to serve the contingent uses was *in nubibus*, or *in custodiâ legis*. Lord St. Leonards advocated the opinion that the contingent uses took effect as they arose, by force of and relation to the seisin of the grantee to uses—the estates opened and let in the contingent uses as they came *in esse* (*t*). This last view was adopted in the Act to Further Amend the Law of Property (Lord St. Leonards' Act), 1860 (*u*), which enacted:—

> S. 7. "Where by any instrument any hereditaments have been or shall be limited to uses, all uses thereunder, whether expressed or implied by law, and whether immediate or future, or contingent or executory, or to be declared under any power therein contained, shall take effect when and as they arise by force of and by relation to the estate and seisin originally vested in the person seised to the uses; and the continued existence in him or elsewhere of any seisin to uses or *scintilla juris* shall not be deemed necessary for the support of or to give effect to future or contingent or executory uses, nor shall any such seisin to uses or *scintilla juris* be deemed to be suspended, or to remain or to subsist in him or elsewhere."

Object of statute defeated.

We have seen how entirely the object of the statute *De Donis* was ultimately defeated by legal construction (*v*). So, although the design of the Statute of Uses was to put an end to the system of severance of the beneficial from the legal ownership, and to unite the two in the same person—virtually to abolish uses by turning them into legal estates—to "marry" the use indissolubly to the land, and thus restore in effect the singleness and simplicity of the common law (*x*); this design was frustrated by legal ingenuity sanctioned by judicial decision.

No use upon a use.

The statute, it has been observed, applied only to the case in which one person was seised to the use of another; and in that case it declared that the person who had the use, should be deemed to be "in lawful seisin, estate, and possession," of the lands. The contrivance resorted to in order, notwithstanding the statute, to create a beneficial interest apart from the legal estate, was to make a conveyance of the lands to one person to the use of another, and then to go on to declare that that other

(*s*) Sanders on Uses, p. 108.
(*t*) Sugden on Powers, ch. i. sect. 3.
(*u*) 23 & 24 Vict. c. 38, s. 7.
(*v*) *Ante*, p. 62 *et seq.*
(*x*) Hayes' Popular View of Law of Real Property, 32.

should hold it "upon trust" for the person who was to take the beneficial interest. Thus the property was conveyed to A. to the use of B. in trust for C. Under this arrangement A. played the part of what was termed a "conduit-pipe," that is, was a person momentarily only receiving the seisin; this seisin, at the same instant of time, the statute withdrew from him and transferred to B. Having thus transferred the seisin to B., according to the construction, shortly after the passing of the statute, put by the Courts on the statute, it left it there; yet B., when he got the estate himself, held it in trust for C. This trust, however, for C., was not considered as being the trust or use on which A. held the lands. The Court adhered to the literal terms of the statute, which only executed the use to which one person was seised for another, and in the instance in question the use to which A. was seised was for B., and not for C.

The foundation of this doctrine was, that there could not be a use upon a use, which it was said would have been the result had the statute executed the double use, namely, first that to B., and then that to C., instead of confining its effect to the use to B. (*z*).

Thus says Mr. Hayes (*b*):—

"It was found that, by a very ready process, the legal estate might be separated from the equitable or beneficial right as before. The things remained: the terms only were changed. The primary 'use,' on which the statute did operate, retained, along with its new character of a legal estate, its ancient appellation of a 'use;' the secondary use, on which the statute did not operate, was called, for distinction's sake, a 'trust.' As the 'use' became, henceforth, by the effect of the statute, essentially the legal estate in the land, it ceased to be the creature of equity, and fell under the ordinary cognizance of the Courts of Common Law."

Person seised having active duties.

While the Courts of law thus refused to extend the operation of the statute beyond the first use of a series, they at the same time refused to apply the statute to cases in which a person was seised to a use or upon a trust which required some active duty to be discharged in favour of some other person. Thus, suppose lands to be conveyed to A. upon trust to recover and receive the rents, and then pay them over to B.; here, inasmuch as the active duty of receipt was cast upon A., the Court left him clothed with the legal estate, for, it said, the lands must remain in the trustee to enable him to perform the trust; but had the trust in

(*z*) *Tyrrel's Case*, Dyer, 155*a*; and Tudor, L. C. R. P. 335.

(*b*) Popular View of Law of Real Property, p. 36.

A. been to "permit the rents to be received" by B., the result would have been the other way. In the latter case, the use would have been executed in B. (c).

Executory limitations.

The only future estates known to the common law are remainders and reversions, and it will be remembered that the following conditions are necessary to the validity of a remainder: —(1) it must be supported by a particular estate of freehold; (2) it must take effect in possession at the instant when the particular estate determines; but it cannot take effect in defeasance of, or at a time not coincident with the determination of, the particular estate; (3) it cannot be limited to take effect on the determination of an estate in fee simple. Before the Statute of Uses a future use (as distinguished from a common law estate) was subject to none of these conditions; and therefore, as the statute did not alter the nature of a use, but merely clothed the use with the legal estate, it became possible after the statute, by means of a declaration of uses, to create a future legal estate without conforming to the conditions essential to the validity of a remainder at common law. The limitations thus introduced are called "springing" or "shifting" uses.

Executory devises.

At common law the land itself, *i.e.* the legal estate in it, could not be devised, but, before the Statute of Uses, the Court of Chancery gave effect to the devise of the use, where a feoffment had been made to the uses of the feoffor's will. The Statute of Uses prevented this from being done, for the effect of the feoffment was to raise a resulting use in favour of the feoffor, so that by virtue of the statute he took back the legal estate. But the Statute of Wills (e) enabled the land itself (*i.e.*, the legal estate), to be devised; and it was held that the land might be devised and future estates created by will with the same disregard for the rules of common law as in a disposition of the use by an instrument *inter vivos*. Devises of this nature taking effect in derogation of the rules of Common Law are called "Executory Devises" (f). With an exception that will afterwards be pointed out, springing and shifting uses and executory devises are subject to the same rules, and they are therefore sometimes grouped together under the name of "Executory Limitations."

(c) Elph. N. & C. Interp. 271 (Rule 102 and examples there given). See *Re Lashmar* [1891], 1 Ch. 258.

(e) 32 Hen. VIII. c. 1.

(f) "The term 'executory devise' properly indicates the mode in which the interest is created; but it is commonly used to indicate the interest itself." Challis, R. P. 57.

It should be observed that if a limitation can possibly take effect as a remainder according to the rules of common law, it will not be construed as an executory limitation, even if the consequence be that it will fail to take effect owing to the rules as to destruction of contingent remainders (*g*).

Shifting and springing uses must be distinguished, and executory devises may conveniently be distinguished into similar classes, though it is perhaps not very usual so to distinguish them (*h*).

Shifting use.

Where there is a limitation by way of use of a freehold estate, followed in the same deed by a limitation of a use which cuts short that estate, the latter use is called a shifting use.

Where the first limitation is of a determinable fee simple, a use to arise on its determination is also called a shifting use.

Shifting uses occur constantly in strict settlements of land (*i*). An example of a shifting use will be found in one form of the "name and arms" clause. Suppose that the limitations are "to the use of A. for life with remainder to the use of his sons successively according to seniority in tail," the clause in question directs A. and his sons to take a certain name and bear certain arms, followed by a direction that if this is not done the land shall go to certain other uses; in this case, if A. does not take the prescribed name, the use to him during his life ceases, and the new use takes effect in defeasance of his estate. In like manner, if there be a devise of land to A. in fee simple, but, if A. dies under twenty-one, to B. in fee simple, on A.'s death under twenty-one the estate of B. takes effect in defeasance of A.'s estate.

Another example of a shifting use is afforded by the common limitations in a marriage settlement "to the use of A. (the settlor) in fee simple until the intended marriage, and after the marriage to the use of A. for life" (with remainders over). Here A. takes a fee simple determinable on marriage, and upon that event, the uses to A. for life and the subsequent uses take effect.

It will be observed that shifting uses and devises are conditional limitations (*j*).

Springing uses.

Springing uses are limitations of the use for a freehold

(*g*) Challis, R. P. 96. See Jessel, M.R., *Re Lechmere and Lloyd*, 18 Ch. D. 524, 529. *Ante*, p 235.

(*h*) There is some discrepancy in the terminology used by different writers. See Challis, R. P. 140; Gray on Perpetuities, § 54.

(*i*) See Mr. Butler's note, Co. Litt. 327*a*.

(*j*) See *ante*, p. 181.

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interest, to take effect either upon a contingency or after the lapse of a fixed period, which, if they had been legal limitations arising at common law, would have been void as attempts to create a freehold *in futuro*.

The discussion of springing uses created by deeds is perhaps too difficult for a student. The learned editor of Fearne (*k*), Mr. Challis (*l*), and Professor Gray (*m*), are of opinion that some of the decisions are erroneous.

Springing devise.

An example of a springing devise is afforded by a devise to A. when he shall attain twenty-one years of age; or to the children of B., where B. has no child living at the death of the testator (*n*). Such limitations would be void, if construed as contingent remainders, for want of a particular estate of freehold to support them.

So, if there be an interval between two successive limitations, as where lands are devised to A. for life, and, at the expiration of one year from his death, to B.

In these cases the seisin is held to be in the testator's heir or residuary devisee, and not in abeyance (*o*).

40 & 41 Vict. c. 33.

The reader is now in a position to understand the meaning of the Act (*p*) which makes a contingent remainder (created by any instrument executed, or any will or codicil revived or republished after August 2, 1877), which would have been good as a springing or shifting use or executory devise, if it had not had a sufficient estate to support it as a remainder, capable of taking effect as a springing or shifting use or executory devise. Suppose, for example, that the limitations be to the use of A. during his life, with remainder to the use of such of his children as attain twenty-one. It will be observed that this is a contingent remainder to the children which would fail as a remainder in case no child had attained twenty-one at A.'s death. The effect of the Act is that in

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(*k*) C. R. 41.

(*l*) 1 Law Quarterly Review, 412.

(*m*) Perpetuities, 38 *et seq.*

(*n*) So where the devise is to such children of A. living at her death, as *either before or after her death* should attain twenty-one; *Re Lechmere and Lloyd*, 18 Ch. D. 524; for "where the gift is to a class which can by no possibility be ascertained at the determination of the preceding estate of freehold, the class can only take on the footing of its being an executory devise;" *per* Jessel, M.R., *Ib.*, p. 528. See also *Miles* v. *Jarvis*, 24 Ch. D. 633, where the devise was to A. for life, and after her decease to all the children of B. living at the decease of A. or thereafter to be born; and this was held to be an executory devise, under which children born after the death of A. were entitled to share with those born before A.'s death.

(*o*) Fearne, C. R. 544.

(*p*) 40 & 41 Vict. c. 33, *ante* p. 236.

this case the gift to the children takes effect by way of springing use.

Executory bequests of chattels.

There is a class of executory devises, or rather bequests, that has no analogy in uses, namely, where a term of years or other chattel is bequeathed to one for life, or otherwise, and after the death of the legatee, or the happening of a contingency, is given to someone else. Such a gift is void at law when contained in conveyances *inter vivos*, and, as uses cannot be declared of a chattel, such a gift could not be created by means of uses, but it is good when contained in a will (*q*).

Alienation.

Executory uses or devises were formerly, to the same extent as contingent remainders, incapable of alienation so long as their ultimate vesting remained in a state of suspense (*r*). Now they can be disposed of by deed (*s*), and devised (*t*).

Period within which estate must arise.

In order to guard against the mischiefs of a perpetuity, the law has prescribed a rule as to the limit of time within which executory interests must take effect. This rule was finally settled in a case before the House of Lords in 1833 (*u*). There the following question was put by the Lords to the Judges:—

> "Whether a limitation by way of executory devise is void, as too remote, or otherwise, if it is not to take effect until after the determination of one or more life or lives in being, and upon the expiration of a term of twenty-one years afterwards as a term in gross, and without reference to the infancy of any person who is to take under such limitations, or of any other person?"

The Judges answered that such a limitation is not too remote or otherwise void. And they added that a further period for gestation was to be allowed in those cases only in which the gestation exists.

When period begins.

The time from which the period allowed by the rule begins to run is, for an executory use, the date of the deed, and for an executory devise the death of the testator (*x*).

Possible, not actual, events considered;

The validity of an executory devise with respect to the rule against perpetuities is determined at the death of the testator; and, in the case of all executory limitations, possible, and not actual, events are alone considered (*y*). Consequently, no limi-

(*q*) Fearne, C. R. 401.
(*r*) Challis, R. P. 142, citing Viner, Abr. 462, *Possibility*, B., pl. 5.
(*s*) 8 & 9 Vict. c. 106, s. 6.
(*t*) 1 Vict. c. 26, s. 3.
(*u*) *Cadell* v. *Palmer*, 1 Cl. & F. 372; and Tudor, L. C. R. P. 424. *Ante*, p. 97.
(*x*) Tudor, L. C. R. P. 465.
(*y*) *Jee* v. *Audley*, 1 Cox, 324.

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—failure of issue.

tation is good unless it must necessarily take effect within the period allowed by the rule (z). Suppose, for instance, there be a gift to A. and his heirs, with a limitation over, on the failure of the issue of B., to C. and his heirs; now, it is evident that, though the issue of B. may fail in the lifetime of A., it possibly may not fail for centuries; and during that period the property would be inalienable, inasmuch as A. or his heirs cannot bar or destroy the estate limited to C., as it is an executory devise. If, therefore, the failure of issue be taken to mean a failure of issue at any time, however distant, the limitation would be void as too remote. Many difficult questions have arisen as to whether words importing a failure of issue mean a general failure of issue or a failure of issue at the death of the person from whom they descend (a). These questions are for the most part got rid of by the provision of the Wills Act (b), that, in devises, words which may import either failure of issue of any person in his lifetime, or at his death, or an indefinite failure of his issue, shall be construed to mean a failure of issue in the lifetime or at the time of the death of such person, and not an indefinite failure of his issue, unless a contrary intention shall appear by the will (c).

Limitation after an estate tail.

But the rule against perpetuities is applicable only to such executory limitations as are limited on estates in fee simple or terms for years; for, speaking generally, no period is too remote for the limitation of an executory estate or interest engrafted on an estate tail previously limited. Thus, if lands be limited to A. in fee simple, or for years, and if A. should have no child who attains the age of twenty-seven years, to B., in this case the limitation to B. is void for remoteness; but if land be limited to A. in tail, and if A. should have no child who attains the age of twenty-seven years, to B., the limitation to B. is good. The reason is, that, where an executory limitation is engrafted on an estate tail, it is always liable to be barred by the tenant in tail, and therefore the remoteness of the event on which it depends does not suspend the ownership of the property so as to create a perpetuity (d).

Effect of remoteness.

Where a limitation is void as being too remote, any subsequent limitations are not thereby accelerated, but are void also (e).

(z) Notes to *Cadell* v. *Palmer*, Tudor, L. C. R. P. 465; *Dungannon* v. *Smith*, 12 Cl. & F. 546.

(a) See *Forth* v. *Chapman*, Tudor, L. C. R. P. 682.

(b) 1 Vict. c. 26, s. 29.

(c) Of this hereafter, in chapter xv. on Wills.

(d) Fearne, C. R., note by Butler, 522.

(e) Notes to *Cadell* v. *Palmer*, Tudor, L. C. 489.

Example of void devise.

A good instance of an executory devise void for remoteness is to be found in the following case (*f*). A testator gave his real and personal estate to trustees upon trust for his wife during widowhood, and after her death or second marriage, for his children who might be living at such death or second marriage, and the issue of any child who might have previously died, such issue to take the share of his or her deceased parent in equal shares; the shares of such of his children or grandchildren as should be a son or sons to become vested in and payable to them as and when he or they should respectively attain the age of twenty-four years, and the shares of his daughters or the female issue of any deceased child to be settled as therein mentioned. It was held by Jessel, M.R., that the whole of the gifts after the life interest of the widow were void for remoteness, because the class of objects whom the testator meant to benefit were not necessarily ascertainable within the limit allowed by the rule against perpetuities; for "a child might die in the lifetime of the widow, or before her second marriage, leaving a son under the age of one year; the widow might then die, or marry, and such son might not attain twenty-four years of age within the legal period."

The vice of remoteness affects a class as a whole, if it may affect an unascertained number of its members (*g*).

Devise upon event which does not precisely happen.

An executory devise limited to arise upon the failure of a prior interest may take effect, although the failure has not happened in the particular mode anticipated by the testator: for it is considered that the testator's intention was that the ulterior gift should take effect at all events upon the failure of the prior one. Thus, A. bequeathed a term for years to his wife for life, and after her death to the child she was then *enceinte* with, but if such child died before twenty-one, then he bequeathed one third part of the said term to his wife. The wife not being *enceinte* at the time of the devise, it was held that the devise of the third part to her was good, though the contingency never happened (*h*).

(*f*) *Hale* v. *Hale*, 3 Ch. D. 643. But if there are alternative limitations which are capable of being separately regarded, the devise may be valid in one event, though it would be invalid in the other; see *Watson* v. *Young*, 28 Ch. D. 436; and *Re Harvey, Peek* v. *Savory*, 39 Ch. D. 289.

(*g*) *Pearks* v. *Moseley*, 5 App. Cas. 714.

(*h*) *Jones* v. *Westcomb*, Prec. C. 316; S. C. Tudor, L. C. R. P. 869; and see the notes. "If the precedent limitation, by what means soever, is out of the case, the subsequent limitation takes effect;" *per* Lord Hardwicke, in *Avelyn* v. *Ward*, 1 Ves. Sen. 420. See, *Murray* v. *Jones*, 2 V. & B. 313, and for recent cases, *Davies* v. *Davies*, 30 W. R. 918; *Re Tredwell*, W. N. 1891, p. 35.

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Restriction on executory limitations (Conveyancing Act, 1882).

By the Conveyancing Act, 1882 (*i*), a restriction has been placed on the effect of executory limitations contained in any instrument coming into operation after 1882, by providing that "where there is a person entitled to land for an estate in fee, or for a term of years absolute or determinable on life, or for a term of life, with an executory limitation over on default or failure of any of his issue, whether within any specified period or time or not, that executory limitation shall be or become void and incapable of taking effect, if and as soon as there is living any issue who has attained the age of twenty-one years of the class on default or failure whereof the limitation over was to take effect." Thus, the settlement is put an end to at a point of time corresponding, as nearly as may be, with that at which, if the land were entailed, the entail could be barred. Hitherto, where there is, for instance, a limitation to A. and his heirs, but if he shall die without leaving issue living at his death, then over, the land has been unsaleable during the life of A., except with the concurrence of persons not ordinarily likely to concur. Alienation is thus facilitated by this enactment.

Trusts.

The practical result of the construction put by the Courts of law on the Statute of Uses (*ii*), was to restore to the Court of Chancery its ancient jurisdiction over beneficial ownership as distinguished from legal estates; the doctrine of uses was revived under the denomination of "trusts." That Court held that uses which the statute could not execute were still "trusts" in equity, which in conscience ought to be performed. And so in the end the Statute of Uses, instead of withdrawing trusts from the control of the Court of Chancery, brought them even more fully within its operation.

Creation and assignment of trusts.

Previously to the Statute of Frauds, a trust might have been created by mere verbal direction. That statute, however, enacted:—

Statute of Frauds, s. 7.

> S. 7. "That all declarations or creations of trusts or confidences of any lands, tenements, or hereditaments, shall be manifested and proved by some writing signed by the party who is by law enabled to declare such trust, or by his last will in writing, or else they shall be utterly void and of none effect" (*j*).

(*i*) 45 & 46 Vict. c. 39, s. 10.

(*ii*) *Ante*, pp. 270, 271.

(*j*) 29 Car. II. c. 3, s. 7. See 1 Cruise Dig. 392. Where the legal estate is vested in a trustee for an absolute beneficial owner, the latter, and not the trustee, is the person who is by law enabled to declare the trust; *Tierney* v. *Wood*, 19 Beav. 330; followed in *Kronheim* v. *Johnson*, 7 Ch. D. 60. See *Dye* v. *Dye*, 13 Q. B. D. 147.

Trusts arising upon any conveyance of land "by implication or construction of law," or trusts "transferred or extinguished by an act or operation of law," are expressly excepted from the statute (*k*). A trust falling within the exception would be such, for example, as the law would imply on the purchase of property by one in the name of another, in favor of him who paid the money. So a mortgagee, after satisfaction of his mortgage, would by implication be a trustee for the mortgagor; and various other illustrations might be furnished.

Assignment of trusts.

It was further enacted by the same statute:—

> S. 9. "That all grants and assignments of any trust or confidence shall likewise be in writing signed by the party granting or assigning the same, or by such last will or devise, or else shall likewise be utterly void and of none effect."

This section, it will be observed, extends to trusts of personalty.

There is no particular form required for a declaration or creation of a trust; a mere request or recommendation, if the subject and object thereof be precisely stated, may create a trust (*l*).

Present distinction between Uses and Trusts.

It will appear from what has been said that since the Statute of Uses, and under the construction respecting the execution of the use put upon the statute, uses and trusts have branched out into two different classes.

First. A limitation of a freehold estate in land to one to the use of another vests the legal estate in the *cestui que use*, and the result is the same if the word "trust" be substituted for the word "use;" for example, a limitation to A. "in trust for" B.

Secondly. Where a legal estate, either of freehold or less than freehold, is vested in one, and a trust is engrafted on that estate, the trustee retains the legal estate and the trust is altogether different from the use,—as in the case of a gift to A. to the use of B. in trust for C., or unto and to the use of A. in trust for B. It should be noticed that, although, where the limitation is "unto and to the use of A., in trust for B." (*i.e.* "to A. to the use of A. in trust for B.)," A. takes by the common law, not by the statute (*m*), still the trust for B. is considered to be a use upon a use, and B. takes an equitable estate only.

(*k*) 29 Car. II., c. 3, s. 8; 1 Cruise, Dig. 391.

(*l*) Notes to *Tyrrell's Case*, Tudor's L. C. R. P. 366, referring to *Harding* v. *Glyn*, 2 W. & T. L. C. 262.

(*m*) *Ante*, p. 268. *Meredith* v. *Jones*, Cro. Car. 244; *Doe* d. *Lloyd* v. *Passingham*, 6 B. & C. 305.

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III. Trusts.

1. Active—Passive.

Trusts have been divided into—(1) "active" and "passive"; (2) "executed" and "executory."

An Active Trust is, as we have seen, one involving the discharge of some active duty on the part of the trustee. Thus, a trust to raise money by sale or mortgage of lands; a trust to keep up an almshouse out of the rents and profits of property; or a trust to receive and accumulate the income of property for a given period, and at the expiration of the period to apply the accumulations, are Active Trusts. On the other hand, a trust to permit A. B. to receive the rents and profits of property, or, to allow a dwelling-house to be occupied by C. D., would be Passive Trusts. In the former instances the active interference of the trustee is necessary. In the latter he has only to remain passive, and allow the property to be enjoyed in the manner indicated by the author of the trust.

2. Executed—Executory.

An Executed Trust is where the trust is complete in its creation, and the beneficial interests created under it are defined by the instrument creating the trust and are final; in other words, when no act is necessary to be done to give effect to them, the declaration of trust being originally complete (*n*). Thus, where there is a conveyance unto and to the use of A. and his heirs, upon trust for B., for his life, with remainder to C. in fee, the interests to be taken by B. and C. under the trust are defined by the conveyance itself, and nothing further has to be done.

An Executory Trust, on the other hand, requires something further to be done to give it complete and final effect,—some further act by the author of the trust or the trustees, to give effect to it, as in the case of marriage articles (*i.e.*, an agreement made before marriage to make a marriage settlement), and as in the case of a will where property is vested in trustees in trust to settle or convey in a more perfect and accurate manner (*o*). Thus, let property be devised to trustees upon trust to pay the rents and profits to the devisor's daughter for life, and, in the event of her marriage, to make a settlement of it upon her and her children; in this case the trusts for the daughter and her children in the event of her marriage would be executory, requiring something further to be executed, namely the settlement, in order more accurately to define them.

(*n*) 1 W. & T. L. C. 18, notes to *Lord Glenorchy* v. *Bosville*, Elph. N. & C. Interp. 532.

(*o*) *Ib.*, and see *per* M.R. in *Miles* v. *Harford*, 12 Ch. D. 699.

In cases of executed trusts, a Court of Equity will construe the limitations in the same manner as similar legal limitations, for there the author of the trust does not suppose any other conveyance will be made; but in cases of executory trusts, where something is left to be done, it will not construe technical expressions with legal strictness, but will mould the trusts according to the intent of those who create them (*p*).

3. Express—Implied.

Again, trusts may be either express or implied. An express trust is where by the instrument creating it, or some other instrument forming part of the same transaction, the trusts on which the property is to be holden are expressly set forth.

An Implied Trust is where there is no express declaration of trust, but constructive or resulting trusts arise by implication of law.

Trustees. Crown or Corporation.

Neither the Crown nor a corporation aggregate, could, prior to the Statute of Uses, be seised to uses. Thus, for example, if lands were conveyed to the king to the use of a subject, or to a corporation to the use of a charity; in the former case the king, and, in the latter case the corporation, would hold discharged of the use, and for their own benefit. It is different, however, in respect to the modern trust in the case of a corporation (*q*), but though the Crown may hold as trustee, the trust cannot be enforced against it (*r*). Instances more frequently occur in relation to corporations where, property having been given to them for charitable purposes, their administration of it is called into question. The reason that a corporation could not stand seised to a use was, that the writ of *subpœna* did not issue against it to compel the performance of the trust; a reason which has ceased to operate (*s*).

Alienation and devolution of trust estate.

The estate vested in the trustee, that is, the dry legal ownership, is capable of alienation by him in his lifetime, and, until recently, might be devised by his will, or, in the absence of testamentary disposition, it devolved on his heir.

The Vendor and Purchaser Act, 1874 (*t*), provided that—

"Upon the death of a bare trustee (*u*) of any corporeal or incorporeal

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(*p*) 1 W. & T. L. C. 19; Elph. N. & C. Interp. 534.

(*q*) 1 Sanders on Uses, 56, 87 and 389.

(*r*) *Pawlett* v. *Att.-Gen.*, Hard. 465; Chitty, Prerog. 378; 1 Cruise, Dig. 403.

(*s*) 1 Sanders on Uses, 87; Lewin on Trusts, 2.

(*t*) 37 & 38 Vict. c. 78, s. 5.

(*u*) Great difficulty has been felt as to the meaning of a "bare trustee,"—"A difficulty so great," said Jessel, M.R., "that persons of great knowledge and

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hereditament of which such trustee was seised in fee simple, such hereditament shall vest like a chattel real in the legal personal representative of such trustee."

This section was repealed as to England on and after the 1st January, 1876, by the Land Transfer Act, 1875 (38 & 39 Vict. c. 87), s. 48, except as to anything done thereunder before that date. By the same section the provisions of the repealed section were re-enacted with the insertion of the word "intestate" after "bare trustee," and the section as re-enacted was not to apply to land registered under the Act.

Both these sections were repealed by the Conveyancing and Law of Property Act, 1881 (*x*), which provides that in case of death after the 31st December, 1881, where an estate or interest of inheritance, or limited to the heir as special occupant, in any tenements or hereditaments, is vested on any trust (or by way of mortgage) in any person solely, the same shall, on his death, notwithstanding any testamentary disposition, devolve to and become vested in his personal representatives in like manner as if the same were a chattel real. This section has been repealed with respect to a trustee or mortgagee who has been admitted to copyhold or customary hold land (*y*).

Who are bound by the trust.

The trust estate is, as regards all persons taking the property, even for valuable consideration, *with notice* of the trust, and, as regards persons taking as volunteers, even without notice, and in all cases of succession by representatives, subject in equity to the trust. If, however, a trustee convey the estate for value to a person who had no notice of the trust, the trust itself may be defeated. The legal estate would prevail at law, upon the principles already explained; and the Courts of Equity have declined to interfere when, the equity of the beneficiary and that of the purchaser being, as it is said, equal, the latter had obtained the advantage of the legal estate (*z*). Hence, the necessity insisted

Purchaser for value without notice.

learning, who have paid particular attention to the subject, entertain some doubt as to its meaning" (see *Morgan* v. *Swansea Urban Sanitary Authority*, 9 Ch. D. 584; *Christie* v. *Ovington*, 1 Ch. D. 279 (Hall, V.C.). See *Re Cunningham and Frayling*, W. N. 1891, p. 77, where Stirling, J., followed the opinion of Hall, V.C., in preference to that of Jessel, M.R.) The expression also occurs in the Fines and Recoveries Act (3 & 4 Wm. IV. c. 74, s. 31), and in the Charitable Trusts Act, 1853 (16 & 17 Vict. c. 137, s. 50), and in the Vendor and Purchaser Act, 1874, s. 6, which renders the concurrence of the husband unnecessary to the conveyance by a married woman as "bare trustee;" see *Re Docwra*, 29 Ch. D. 693; Dart, V. & P. 587.

(*x*) 44 & 45 Vict. c. 41, s. 30.

(*y*) *Ante*, p. 192.

(*z*) 1 Sanders on Uses, 348 *et seq.*

on in conveyancing of "getting in," as it is termed, the legal estate (*a*).

Notice.
1. Actual.
2. Constructive.

But a Court of Equity would not so decline to interfere if the alienee had knowledge, technically termed "notice," of the trust. Such notice may be either Actual or Constructive; under either of which fraud will in equity be imputed to the purchaser; so that, as will be seen from what follows, the purchaser may be in fact wholly innocent, and yet in equity will be accounted party to the fraud. Says Mr. Hayes (*b*):—

"If A., having signed a contract for the sale of land to B., but not having conveyed it to him, afterwards sells and conveys it to C., who, at the time of his purchase, is distinctly apprised of the previous sale, C. is said to have '*actual* notice' of the equitable right of B. 'Actual notice,' therefore, is clear direct intimation of the fact. But if C. had obtained merely a knowledge of some fact or circumstance (as B.'s possession of the land, or the exercise by him of an act of ownership), which, if investigated or pursued, would have conducted him (C.), either immediately, or through a long train of facts and circumstances, to a knowledge of the contract with B., then C. is said to have '*constructive* notice' of the equitable right of B. And if the attorney or agent employed by C. to negotiate his purchase, receive in the course of the negotiation, either actual or constructive notice, the effect is the same upon the conscience of C., although the agent should never communicate his information, as if C. were personally in the secret. Thus 'constructive notice' to an agent is constructively imputed to the principal.

"To acquire land with 'notice' whether actual or constructive, of the right of another, is, in the eye of equity, to acquire it dishonestly. A., in the case above supposed, is guilty of a breach of trust, to which C. is accessory. If C., having thus bought with knowledge of the trust, resell and convey the land to D., without communicating that knowledge, D. cannot be compelled to restore the land, but B. has his remedy in equity against both A. and C. to compel them to make good the loss which he has sustained" (*c*).

Conveyancing Act, 1882.

By the Conveyancing Act, 1882 (*d*), an attempt is made to express with certainty the law of constructive notice, which has hitherto had to be extracted from the numerous decided cases.

(*a*) See *ante*, pp. 205, 206.

(*b*) Hayes' Popular View of Law of Real Property, 53—55.

(*c*) Reference may usefully be made to the case of *Carter* v. *Williams* (L. R. 9 Eq. 678), as exemplifying the doctrine of constructive notice (though applied to another matter, viz., the burden of a restrictive covenant), showing on the one hand a state of facts in which it would arise, and on the other a state of facts in which it would not arise. See also *Patman* v. *Harland*, 17 Ch. D. 353, as to constructive notice of the contents of a deed (*e.g.*, a lease) of the existence of which a purchaser knows.

(*d*) 45 & 46 Vict. c. 39, s. 3, App. *post*.

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Trustee Acts, 1850, and 1852.

The ordinary jurisdiction of a Court of Equity suffices to call trustees to account, to compel their execution of the trusts, to control their administration of them, and to deal with the legal estate according to the direction of the Court. But formerly the Court had no power to deal with the legal estate in cases where the trustee was under incapacity (*e*). After a succession of statutes, the Trustee Act, 1850, and the Trustee Act Extension Act, 1852 (*f*), provided machinery for this purpose.

Vesting Orders --Lunatic Trustees.

The Acts enabled the Lord Chancellor, or other the person or persons entrusted by virtue of the Queen's sign manual with the care of the persons and estates of lunatics, to make an order vesting the lands of lunatic trustees (and mortgagees) in such person or persons in such manner and for such estate as he or they should direct (*g*); the Acts also enabled the Court of Chancery to make orders vesting the land of infant trustees (and mortgagees) (*h*), and the land of trustees out of the jurisdiction of the Court (*i*), or when it is uncertain which of several trustees was the survivor (*j*), or when it is uncertain whether the last trustee be living or dead (*k*), or when a trustee dies intestate without an heir, or it is not known who is the heir or devisee (*l*), or when a trustee refuses or neglects to convey (*m*), or when a trustee is convicted of felony (*n*), in such person or persons in such manner and for such estate as the Court shall direct. In these cases also the Acts empowered the Lord Chancellor, or other person entrusted with the care of lunatics, or the Court of Chancery, as the case might be, instead of making a vesting order, to make an order appointing a person to convey (*o*). As to lunatic trustees or mortgagees, the provisions of the Trustee Acts above referred to have been repealed by the Lunacy Act, 1890 (*p*), which confers similar powers on the Judge in Lunacy (*q*).

—Infant trustees, &c.

Lunacy Act, 1890.

New trustees.

The Trustee Acts also provided that whenever it should be

(*e*) Such matters are now assigned to the Chancery Division of the High Court: 36 & 37 Vict. c. 66 (Jud. Act, 1873), s. 34, § 3.

(*f*) 13 & 14 Vict. c. 60, extended by 15 & 16 Vict. c. 55. *Ante*, p. 113.

(*g*) 13 & 14 Vict. c. 60, ss. 3, 4; 15 & 16 Vict. c. 55, s. 11; and 38 & 39 Vict. c. 77 (Jud. Act, 1875), s. 7.

(*h*) 13 & 14 Vict. c. 60, ss. 7, 8. Now Chancery Division of High Court, 36 & 37 Vict. c. 66 (Jud. Act, 1873), s. 34 (3).

(*i*) Ss. 9—12.

(*j*) S. 13.

(*k*) S. 14.

(*l*) Ss. 15 and 16.

(*m*) Ss. 17, 18; and 15 & 16 Vict. c. 55, s. 2.

(*n*) 15 & 16 Vict. c. 55, s. 8.

(*o*) 13 & 14 Vict. c. 60, s. 20; and 15 & 16 Vict. c 55, s. 11.

(*p*) 53 Vict. c. 5, s. 342.

(*q*) *Ib.* s. 129, ss. 133—143. See s. 108, as to the "Judge in Lunacy."

expedient to appoint a new trustee, and it should be found inexpedient, difficult, or impracticable so to do without the assistance of the Court, the Court of Chancery might make an order upon petition appointing a new trustee, who should have the same powers as if appointed by decree in a suit; and at the same time, or by a subsequent order, to direct that any land subject to the trust should vest in such new trustee (*r*).

By the County Courts Act, 1888 (*s*), jurisdiction in matters within the Trustee Acts is conferred on the County Courts in cases where the trust estate does not exceed in amount or value the sum of £500.

New trustees—Lord Cranworth's Act, 1860.

It became the custom to insert in settlements, wills, and other instruments creating trusts, powers and provisions for the appointment of new trustees, and the transfer of the trust estate to them, whenever any trustee, either original or substituted, and whether appointed by the Court of Chancery or otherwise, should die, or desire to be discharged, or refuse or become unfit or incapable to act. The necessity for these express powers was removed by an Act, commonly called Lord Cranworth's Act, 1860 (*t*), which provided that similar powers should be exerciseable by the persons specified in the Act in the case of any deed, will, codicil, or other instrument executed after the passing of the Act (*u*), or a will or codicil confirmed or revived by a codicil executed after that date (*x*). The Act, however, did not expressly authorise, in the execution of the powers conferred by it, the increase or reduction of the number of trustees; nor was provision made for the case of a trustee remaining out of the United Kingdom for more than twelve months; nor did it apply to the case of a retirement of a trustee without any new trustee being appointed. And in the case of trustees appointed under instruments prior to 28th August, 1860, where there was no power for appointment of new trustees, it was still necessary to apply to the Court. These provisions of the above Act were repealed by the Conveyancing and Law of Property Act, 1881 (*a*), and corresponding powers with the addition of those previously omitted were given by that Act (*b*), and they were made to apply to trusts created either

Conveyancing Acts, 1881, 1882.

(*r*) 13 & 14 Vict. c. 60, ss. 32, 33, and 34; and 15 & 16 Vict. c. 55, s. 9. *Ante*, p. 284, note (*e*). And see *In re Lemann's Trusts*, 22 Ch. D. 633.

(*s*) 51 & 52 Vict. c. 43, s. 67 (5), replacing 28 & 29 Vict. c. 99, s. 1, § 5.

(*t*) 23 & 24 Vict. c. 145, ss. 27, 28.

(*u*) *i.e.*, 28th August, 1860.

(*x*) S. 34.

(*a*) 44 & 45 Vict. c. 41, s. 71.

(*b*) Ss. 31—33.

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before or after the commencement of the Act. Further, the Conveyancing Act, 1882 (*c*), provides, as regards trusts created at any time, that on an appointment of new trustees, a separate set of trustees may be appointed for any part of the trust property held on distinct trusts. Also the Conveyancing and Law of Property Act, 1881 (*d*), provides for the vesting of the trust property by a mere declaration by the appointor, that the trust property shall vest in the persons who by virtue of the deed of appointment "become and are the trustees for performing the trust." Provision was also made by Lord Cranworth's Act, 1860 (*e*), that trustees having power to sell might sell together or in lots, by auction or private contract, under special conditions, might buy in, &c.; the part of the Act containing such provision has been repealed by the Settled Land Act, 1882 (*f*). By the Conveyancing and Law of Property Act, 1881 (*g*), similar powers are conferred on trustees in whom a trust for sale, or a power of sale, is vested by an instrument coming into operation after the 31st December, 1881, so far as a contrary intention is not expressed in the instrument, with the additional power of selling, or concurring in a sale of, all or any part of the property either subject to prior charges or not. The earlier statute also provided for trustees' receipts being discharges (*h*); this, too, has been repealed by the Conveyancing and Law of Property Act, 1881, and a more comprehensive enactment substituted for it (*i*).

Statutory provisions as to sales by trustees under powers.

Trustees' receipts.

Application may be made under Lord St. Leonards' Act, 1859 (*k*), to a judge of the Chancery Division of the High Court by petition for his opinion, advice, or direction, on any question respecting the management or administration of the trust property; but formerly questions of construction could, in general, only be decided in a regular suit (*l*). Now such questions can generally be decided by means of the simple procedure by originating summons (*m*). Where the trust estate (or fund) does not exceed

(*c*) 45 & 46 Vict. c. 39, s. 5.

(*d*) 44 & 45 Vict. c. 41, s. 34, but the section excepts "any legal estate or interest in copyhold or customary land" or "land conveyed by way of mortgage for securing money subject to the trust."

(*e*) 23 & 24 Vict. c. 145, ss. 1 and 2.

(*f*) 45 & 46 Vict. c. 38, s. 64.

(*g*) 44 & 45 Vict. c. 41, s. 35.

(*h*) 23 & 24 Vict. c. 145, s. 29.

(*i*) 44 & 45 Vict. c. 41, ss. 36 and 71. The earlier Act applied only to receipts for money; the new Act extends also to securities or other personal property or effects.

(*k*) 22 & 23 Vict. c. 35, s. 30; 36 & 37 Vict. c. 66 (Jud. Act, 1873), s. 34, § 3.

(*l*) *Re Hooper*, 29 Bea. 656; and Dan. Ch. Pr. 1943.

(*m*) See R. S. C., Order LV., r. 3; Marcy and Dodd on Originating Summons.

in (amount or) value £500, the judge of the County Court within the district of which the persons making the application, or any of them, reside, or resides, has concurrent jurisdiction, under the County Courts Act, 1888 (*n*).

(*n*) 51 & 52 Vict. c. 43, s. 67 (5), and s. 10. replacing 28 & 29 Vict. c. 99, s. 1, § 5,

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CHAPTER XI.

POWERS (a).

We have considered the general nature of an estate—the distinction between estates legal and equitable—and the operation in relation thereto of the Statute of Uses. We proceed to consider the nature of that right which is termed a "Power."

I. Distinction between a power and an estate.

An estate in land is equivalent to the ownership of the land, either for what is practically an absolute interest (subject to that of the lord), as in the case of an estate in fee simple, or for some limited interest, as in the case of an estate for life or in tail. A Power exerciseable with respect to land is distinguishable from an estate in the land (b). It is an authority to dispose of the land or of some interest in it.

"General" and "Special" Powers.

The person to whom the power is given is called the "donee" of the power, or, when he exercises it, the "appointor," and the person in whose favour it is exercised the "appointee." A power may be either "general" or "special," (sometimes called a "limited" or "particular" power). Under a general power, the donee may appoint to any person, including himself; under a special power, an appointment can be made only for the purposes and to the persons or class of persons (called the "objects" of the power) specified by the donor of the power. A power may operate (1) at common law; (2) by virtue of the Statute of Uses; (3) by virtue of some other statute; (4) in equity only. We proceed to give an example of a power of each kind.

(1) Common Law Power.

First, as to common law powers:—

If A., being seised in fee, devise to B. in fee simple, B. takes the legal estate in the land. But if, instead of devising the land,

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(a) It is impossible within the necessary limits of this chapter to do more than discuss some of the more important questions arising on Powers. See Farwell on Powers; Sugden on Powers.

(b) *Dickenson* v. *Teasdale*, 1 De G. J. & S. at 59. "A power is an individual personal capacity of the donee of the power to do something;" *per* Fry, L.J., *Ex p. Gilchrist*, 17 Q. B. D. at p. 531. It may in one sense be called the "property" of the person in whom it is vested, because every special capacity of a person may be said to be his property; but it is not "property" within the meaning of that word as used in law; *Ibid.* A general power is an "interest" within the meaning of Romilly's Act, 3 & 4 Will. 4, c. 104: see *Fleming* v. *Buchanan*, 3 De G. M. & G. 976.

A. by his will directs B. to sell it, B. takes a power, that is, an authority to sell and convey the land, but he does not take an estate in it. In this case, until sale, the land descends to the heir at law. But if B. sells, he can convey the legal estate in the land to the purchaser, and, on his doing so, the estate of the heir is divested, *i.e.*, taken out of him. A conveyance made by B. in exercise of such a power is called a bargain and sale, and operates at common law, so that, if uses are declared on the seisin of the purchaser, the *cestui que use* takes the legal estate.

Bargain and sale at common law.

Secondly, as to powers operating under the Statute of Uses:—

(2) Powers under Statute of Uses.

If lands be conveyed to A. and his heirs to hold to the use of B. and his heirs, B., under the Statute of Uses, acquires a legal estate in fee simple. But if the land be conveyed to A. and his heirs, and A. be directed to stand seised of it to such uses as B. shall by deed or will appoint, and if B. fail to appoint, and in the meanwhile, subject to his appointment, to the use of C. and his heirs, B. has no estate at all, but only a power,—a power of appointing the use; and in the meanwhile, until he exercises the power, the estate vests in C., subject only to be divested by an exercise of B.'s power. B. may, for example, appoint the use to D. in fee simple, or to D. for his life only. In the former case, the exercise of the power totally divests C. of his estate, and vests the fee simple in D.: in the latter, it divests C. of his estate to the extent of D.'s life estate. In the former case, the result of the exercise of the power is the same as if by the instrument creating it A. had stood seised to the use of D. in fee; in the latter, it is as if he had stood seised to the use of D. for his life, with remainder to the use of C. in fee. On the appointment being made it operates as a declaration of a new use upon the seisin of A., and the new use takes effect from the time of execution of the power, as if it had been created by the original deed containing the power (*c*).

In this case, as D. takes the legal estate by virtue of the Statute of Uses, the effect of the statute is exhausted, for there cannot be a use upon a use (*d*). It follows that, if any uses are declared on the seisin of D. in favour of any other person, that person does not take the legal estate.

Thirdly, as to statutory powers:—

(3) Statutory Powers.

A statutory power is, as its name denotes, one conferred by

(*c*) 2 Da. i. 176. (*d*) *Ante*, p. 270.

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Act of Parliament. A good example of a statutory power is afforded by the power vested in the tenant for life by the Settled Land Act to sell and convey the settled land (*e*). Where the tenant for life exercises his power, he can dispose of the whole interest settled, so that, if the legal fee is settled, he can convey the legal estate in fee to the purchaser; and, if uses are declared on the seisin of the purchaser, the *cestui que use* takes the legal estate under the Statute of Uses.

(4) Equitable Powers.

Fourthly, as to equitable powers:—

There are two classes of equitable powers. A power of the first kind merely enables the donee to dispose of an equitable interest. For example, if the legal fee is vested in trustees in trust for A. for life, with remainder in trust for such persons as A. shall appoint, and in default of, and until, appointment, in trust for B. in fee simple, both A. and B. take equitable estates, but the estate of B. is liable to be divested wholly or partially by an exercise of the power. If, for instance, A. appoints to C. in fee simple or for life, the appointment operates as a declaration of trust in favour of C., exactly in the same manner as if it had been inserted in the settlement. In the former case, the exercise of the power divests B.'s estate wholly, in the latter case partially, so as to let in C.'s life estate. The result of the exercise of the power in the first case is the same as if by the settlement itself the trusts had been for A. for life, with remainder for C. in fee, and in the second case, as if they had been for A. for life, with remainder for C. for life, with remainder for B. in fee.

Another kind of equitable power is where the donee, being legal owner of an estate, could dispose of it if he were not prevented from doing so by some rule of equity; and the effect of the power is merely to remove, either wholly or partially, the restraint imposed by equity. An example is afforded by the express power of sale formerly inserted in a mortgage. The mortgagee, being the legal owner of the land, could have sold, had it not been for the rule of equity that prevented him from doing so. The effect of the power is merely to negative the rule, and to allow him to sell, in certain events.

Concurrent power and estate.

It is possible for the fee simple in land, and also a power of appointment over it, to be vested in the same person; for example, the land may be limited to such uses as A. shall appoint,

(*e*) See this power discussed at length, *ante*, p. 49.

and in default of appointment to A. himself in fee simple. It will not at first sight, perhaps, appear for what reason the estate and the power are thus given to the same person, or how the two can co-exist, yet in truth they may, "the fee vesting until execution of the power, and the execution of the power being the limitation of a use under and by the effect of the instrument, by which the power was reserved" (*f*). This doctrine was of some practical use (*g*); for it was by so limiting a property on the conveyance of it, that in cases where the purchaser was married on or before the 1st January, 1834 (*h*), the widow's right to dower was prevented from attaching.

Uses to bar dower.

The form (*i*) commonly used for effecting this consisted of two distinct parts, each of which answered a separate object. First, a general power of appointment over the fee simple was given to the purchaser by limiting the land to such uses as he should appoint; thus enabling him to dispose of the fee simple without his wife's concurrence, by an exercise of his power: and secondly, the land was, in default of appointment, limited to the use of the purchaser for his life, with remainder, in case of the determination of the life estate during the lifetime of the purchaser, to a trustee and his heirs during the life of and in trust for the purchaser, with an ultimate limitation to the use of the purchaser in fee simple. Under the first part of the form the purchaser took no estate but only a power; by the second part of the form a vested estate of freehold, namely, in the trustee, was interposed between the life estate and the remainder in fee of the purchaser (*k*), so that the purchaser had not at any time during his life an estate of inheritance *in possession*, out of which estate only a wife married on or before the 1st January, 1834, was dowable.

Division of Powers.

Powers are either—(1), Collateral, or (2) Relating to the Land (*l*).

1. Collateral.

A power "collateral" is a bare power given to a mere stranger,

(*f*) *Per* Lord Eldon, *Maundrell* v. *Maundrell*, 10 Ves. 255.

(*g*) As to the effect of an appointment under the power defeating judgments against the owner in fee, see Elph. & Cl. Searches, 9, 20.

(*h*) 3 & 4 Wm. IV. c. 105, s. 14. *Ante*, p. 130.

(*i*) See Elph. Introd. 101.

(*k*) 2 Da. i. 185; and see form, Dav. Conc. Prec. 104.

(*l*) See Farwell on Powers, 8; and Sugden on Powers, 46. By Hale, C.B., they were classified into (1) "simply collateral," (2) "not simply collateral." See also Tudor's L. C. R. P., notes to *Edwards* v. *Slater*, 377.

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who has no interest in the land. It may be "simply collateral," *i.e.*, where the donee cannot exercise it for his own benefit, *e.g.*, a power of sale and exchange in a settlement given to trustees who have no estate in the settled lands, or it may be "collateral and in gross," *i.e.*, where the donee can exercise it for his own benefit, *e.g.*, when land is limited to such uses as A. shall appoint.

2. Relating to the land.

A power "relating to the land" is a power given to some person having an estate or interest in the land over which it is to be exercised.

Examples of both these classes will be found in strict settlements before 1882, where it was the practice to give to the trustees, who took no estate in the land, powers to do acts connected with the administration of the property, as during the minority of the tenant in tail to manage the property, to grant leases, &c., or at the request of the tenant for life, or during the minority of the tenant in tail, at their own discretion, to sell or exchange, &c. (*m*), and also powers to the tenant for life to grant leases and to jointure a wife.

Powers relating to the land are either "appendant" or "in gross (*n*)."

a. Appendant.

They are "appendant" when the estates created by their exercise over-reach and affect the estate and interest of the donee of the power, *e.g.*, a power of leasing given to the tenant for life (*o*).

b. In gross.

They are "in gross" when the estates so created do not affect the estate or interest of the donee, but notwithstanding are annexed in privity to it; *e.g.*, a power of (*p*) jointuring given to a tenant for life is in gross, for a jointure limited by virtue of the power commences from the death of the husband.

Execution of powers after alienation by donee.

If the donee of a power appendant alienates or incumbers his estate, any exercise of the power (which, it will be remembered, takes effect out of his interest), would operate as a derogation from his previous grant, and is therefore invalid as against the alienee or incumbrancer; but he may exercise it with the consent of the alienee or incumbrancer (*q*).

(*m*) See forms in Dav. Conc. Prec. 464, 519*n*; 2 K. & E. 629.

(*n*) There is some confusion in the application of the word "appurtenant" to powers. It is used to denote sometimes only a power appendant, and sometimes any power relating to the land.

(*o*) Farwell on Powers, p. 9.

(*p*) See Dav. Con. Prec. 515; 2 K. & E. 603, 818, for forms of such powers.

(*q*) *Alexander* v. *Miles*, L. R. 6 Ch. 124.

A power, whether appendant or in gross, cannot be exercised after the alienation of the estate of the donee if an intention that it shall not thereafter be exercised is clearly expressed in the instrument creating the power (*r*).

If the donee of the power has an interest in the land, he is said to have "a power coupled with an interest." In such cases an assurance made by the donee will take effect, either out of his interest or under the power, as will best carry out his intention, and that whether he purports to convey as owner, or as donee of the power, or as both (*s*). For example, in *Fox* v. *Chamberlain* (*t*), lands stood limited to such uses as A. should appoint, and in default to him in fee. A. by lease and release, a conveyance sufficient to pass the fee in the absence of the power, "in pursuance of all powers vested in him" appointed to P. and his heirs to certain uses. If the fee passed by the lease and release, the *cestui que use* took the legal estate by force of the Statute of Uses, and the title was good; if the fee passed by the appointment, the *cestui que use* took an equitable estate only, and the title was bad. The Court held that, as the conveyance could operate either way, it must be held to have operated under the lease and release so as to carry out the intention.

Another example is where a tenant for life with power of leasing makes a lease without reference to his power. The lease, if made by him as owner, will expire with his life; and therefore, if the lease is one which could have been made under the power, it will be considered as having been so made (*u*).

Delegation of powers.

Where a power involves the exercise of personal discretion, *e.g.*, a power of leasing, the maxim applies, "*delegatus non potest delegare;*" the donee of the power only can exercise it, and not his attorney. But this maxim does not apply where the act is purely ministerial—*e.g.*, a deed may be executed by attorney (*x*) after the donee has approved the draft; nor does it apply to the case of a general power—*e.g.*, if a man has power of sale as absolute owner, he may sell by attorney. So where an estate stands limited to such uses as A. shall appoint, an appointment by A. to such uses as B. shall appoint will be valid and

(*r*) *Haswell* v. *Haswell*, 2 De G. F. & J. 456.

(*s*) See, for an exception to the rule, Farwell on Powers, 211.

(*t*) 4 Ves. 631.

(*u*) *Campbell* v. *Leach*, Amb. 740.

(*x*) As to the execution now of deeds and other instruments under power of attorney, see *post*, p. 307.

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effectual to pass the legal estate under an appointment by B. of the use (*y*).

Bankruptcy of donee.

By the Bankruptcy Act, 1883 (*z*), it is enacted that when an order has been made adjudging a debtor bankrupt, the property of the bankrupt shall become divisible among his creditors, and shall vest in the trustee in bankruptcy; until he is appointed, the Official Receiver is trustee. The property of a bankrupt, divisible among his creditors, is made to comprise—

> S. 44 (ii). "The capacity to exercise and to take proceedings for exercising all such powers in or over or in respect of property as might have been exercised by the bankrupt for his own benefit at the commencement of his bankruptcy or before his discharge, except the right of nomination to a vacant ecclesiastical benefice."

The trustee is empowered—

> S. 56 (4). "To exercise any powers the capacity to exercise which is vested in the trustee under this Act."

Execution.

Sometimes the power is to be exercised only by an instrument of a particular description, as a deed or a will. At other times certain formalities are attached to its execution; for instance, it may be required that the instrument of execution shall be attested by a given number of witnesses. In all such cases it is requisite that the instrument should be of the prescribed nature, and formerly it was necessary that it should be executed with the prescribed formalities. Thus, a power to be executed by deed cannot be executed by will, or *vice versâ*, and a power requiring the presence and attestation of three witnesses could not formerly be exercised by an instrument executed in the presence of two only.

By deed.

As regards deeds executed after the 13th August, 1859, it is provided by the Act, known as Lord St. Leonards' Act (*a*), that—

Mode of execution of powers.

> "A deed hereafter executed in the presence of and attested by two or more witnesses in the manner in which deeds are ordinarily executed and attested, shall, so far as respects the execution and attestation thereof, be a valid execution of a power of appointment by deed or by any instrument in writing not testamentary, notwithstanding it shall have been expressly required that a deed or instrument in writing made in exercise of such power should be executed or attested with some additional or other form of execu-

(*y*) As to delegation of powers, see Farwell on Powers, 357 *et seq.* And see Lewin on Trusts, 233.

(*z*) 46 & 47 Vict. c. 52, ss. 20 (1), 43, 54.

(*a*) 22 & 23 Vict. c. 35, s. 12.

tion, or attestation, or solemnity: Provided always, that this provision shall not operate to defeat any direction in the instrument creating the power that the consent of any particular person shall be necessary to a valid execution, or that any act shall be performed in order to give validity to any appointment having no relation to the mode of executing and attesting the instrument, and nothing herein contained shall prevent the donee of a power from executing it conformably to the power by writing or otherwise than by an instrument executed and attested as an ordinary deed, and to any such execution of a power this provision shall not extend."

By will.

Thus, also, under the Wills Act (*b*), whatever may be the requirements of the instrument creating the power, if the will exercising the power be executed in conformity with the provisions of the Act, such execution is a valid exercise of a power exercise-able by will; and the Act provides that no appointment made by will in exercise of any power shall be valid unless executed in the manner required by the Act.

Will referring to power.

Where a general power of appointment is made exerciseable by will, it will be exercised by a general devise, but if the power requires it to be exercised only by a will "referring to" the power, the will does not operate as an execution of the power unless it refers to it or deals with the property subject to the power (*c*).

Where a power of appointment was given to a woman "by any instrument in writing to be by her signed, sealed, and delivered in the presence of and attested by two or more credible witnesses," and she devised by her will "all her real and personal estate over which she had a disposing power," it was held not to be a good execution of the power, notwithstanding the Wills Act (*d*). Lord Westbury, L.C., said:—

"If a power be created to be executed by a deed or instrument in writing, although the words seem to indicate instruments *inter vivos* only, yet it is settled that it may be well executed by will. The reason is that the will literally answers the description of an instrument in writing; so, if either before or since the Statute of Wills [*sic*, but the Wills Act is meant] (*e*), a power is created to appoint real estate by deed or will, to be respectively signed, sealed, and delivered in the presence of and attested by three credible witnesses, it is clear that a will executed in manner prescribed by that statute would be a good execution of the power. This is by force of the 10th section of the statute, and not on

(*b*) 1 Vict. c. 26, s. 10. See *post*, chap. xv.

(*c*) 1 Vict. c. 26, s. 27; *post*, p. 394; *Re Phillips*, 41 Ch. D. 417; *Re Tarrant*, 58 L. J. Ch. 780; *Phillips* v. *Cayley*, 43 Ch. D. 222 (C. A. overruling *Re Marsh*, 38 Ch. D. 630).

(*d*) *Taylor* v. *Meads*, 4 De G. J. & S. 597; see *post*, p. 381.

(*e*) 1 Vict. c. 26.

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the ground that the will answers to the description in the power. In the present case the power created in December, 1841, is to be executed by an instrument in writing, signed, sealed, and delivered in the presence of and attested by two credible witnesses; and it is contended that a will duly executed in conformity with the statute, but not sealed, is not an instrument by which the power may be duly exercised. But the power is not in terms a power of appointment by will, and whether it has been duly executed by a will or not depends on the inquiry whether the will answers to the description of the required instrument contained in the power. This the will does not do, if one of the requisite solemnities be wanting, and it is clear that the statute does not make it answer the description: wherever the power is in terms, a power to appoint by will, and the will is required to be under seal, the statute applies, and makes the requisition null, but it does not apply where the power is to appoint by an instrument in writing under seal, for no one can execute a power that requires an instrument in writing under seal, unless the will answers the description of such an instrument, which a will without a seal does not. Attention to the original principle on which a will was held to be a good execution of a power of appointment, by any instrument in writing—namely, that the will answers the description in the power, would have prevented all misapprehension. The statute applies to powers requiring specifically a will with the solemnities of sealing, in addition to the solemnities rendered necessary by the statute, and in such case it declares that a will without such additional solemnities shall be sufficient; but it does not touch the case of a power requiring an instrument in writing, signed, sealed, and delivered; in such a case the only question is, whether the will be such an instrument, and no help can be obtained from the statute. The difficulty, as is usual, does not arise from any uncertainty as to the principle, but from the reports of conflicting and inconsistent decision which is now the fruitful cause of litigation."

Defective execution, when sustained in equity.

There are certain cases in which the execution of a power which is defective at law is sustained in Equity, on behalf of persons standing in certain favoured positions, as purchasers, creditors, the wife and children of the donee of the power, charities, &c. Thus, suppose a person, having a power of appointment by an instrument to be executed in the presence of two witnesses, makes an appointment in favour of any one of these favoured persons by a deed executed in the presence of one witness only; or a person, having a power of appointment by deed or will, writes a memorandum expressing his wish with regard to it and dies without having legally executed it; in both these cases equity supports the execution, provided it sufficiently appears that there was an intention on the part of the donee to give the property which he had power to dispose of (*f*). Similarly a mere agreement, if for

(*f*) Sugden on Powers, chap. xi.; Farwell on Powers, ch. vii. p. 259; and see *Kennard* v. *Kennard*, L. R. 8 Ch. App. 227; *Re Kirwan's Trusts*, 25 Ch. D. 373.

valuable consideration, to exercise a power is in equity treated as a defective execution, and the Court will supply the defect (*g*).

Defective execution in case of Leases.

A statute, 12 & 13 Vict. c. 26 (*h*) has been passed for granting relief against defects in leases made under powers of leasing, in certain cases.

Lessor's covenants in Leases under powers.

By the Conveyancing and Law of Property Act, 1881 (*i*), all covenants which, as against the remainderman, the grantor of a lease under a power has power to enter into, are made legally binding on the successors in title of the grantor.

Powers of revocation;

Where a settlor desires to reserve to himself the power of altering or of revoking the settlement, it is necessary to insert in the deed a power to revoke it, wholly or partially. Such a power is called a "power of revocation," and may operate either under the Statute of Uses, or in equity. As regards voluntary settlements, it is said by Mr. Davidson (*k*):—

> "They are mostly executed with the view to their having a *quasi*-testamentary operation, and being revocable if the settlor should desire to make other dispositions; and the draftsman receiving instructions for an instrument of this kind should therefore provide for the revocation of the settlement, unless he is satisfied that it is the settlor's own wish to make it irrevocable. In many cases voluntary settlements, in form irrevocable, have been treated as revocable, or set aside, on the ground that a power of revocation ought to have been inserted."

The ground for setting aside a voluntary settlement is generally that it was made under undue influence. The absence of a power of revocation and the fact that the attention of the settlor was not called to that absence are, however, merely elements in considering its validity: it may be valid notwithstanding that it contains no power of revocation (*l*).

An estate once created by an assurance operating at common law can only be defeated by a condition (*m*), so that a power purporting to enable a person to revoke the estate is void. On the other hand, where a conveyance contains a declaration of uses so that the *cestuis que use* take legal estates by virtue of the Statute of Uses, it is possible to insert a power to revoke the uses; and

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(*g*) *In re Dyke's Estate*, L. R. 7 Eq. 337.

(*h*) The operation of this Act was suspended till the 1st June, 1850, by 12 & 13 Vict. c. 110, and it was amended by 13 & 14 Vict. c. 17. See *Hallett* to *Martin*, 24 Ch. D. 624; *Gas Light & Coke Co.* v. *Towse*, 35 Ch. D. 519, 539; Farwell on Powers, 285.

(*i*) 44 & 45 Vict. c. 41, s. 11.

(*k*) Vol. iii. pt. i. p. 695.

(*l*) *Hall* v. *Hall*, L. R. 8 Ch. 430; *Henry* v. *Armstrong*, 18 Ch. D. 668.

(*m*) 2 Bl. 327.

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on the power being exercised, the uses cease, and with them the corresponding estates. Provisoes containing power of revocation, says Lord Coke (*n*), crept into voluntary conveyances, which pass by raising of uses, being executed by the Statute of Uses. Such proviso being coupled with a use, was allowed to be good, and not repugnant to the former estates (*o*). In case of such a revocation, says Blackstone (*p*)—

> "The old uses were held instantly to cease, and the new ones" (if the power extended to the appointment of new ones) "to become executed in their stead. And this was permitted partly to indulge the convenience, and partly the caprice of mankind; who (as Lord Bacon observes) have always affected to have the disposition of their property revocable in their own time, and irrevocable ever afterwards."

It should, however, be added, that the execution of a power cannot be revoked, unless a power of revocation be reserved by the instrument executing the power, although the instrument creating the power expressly authorises revocation (*q*).

and new appointment.

Where, in addition to the power of revoking the old uses, power is given to declare new uses, the power is called one of "revocation and new appointment." It has commonly been employed for the purpose of carrying out some of the subsidiary provisions of a settlement, *e.g.*, where powers of sale and exchange are given; this was worked out by giving a power to revoke the old, and declare new uses of the lands sold or given in exchange, and to settle the lands purchased with the money arising from such sale or taken in exchange to the subsisting uses of the settlement (*r*). Other powers frequently inserted in strict settlements, such as the power to jointure (*s*), and express powers of leasing (*t*), really operate in the same manner. It is not, however, the practice expressly to authorize the donee of those powers to revoke the old uses, for the power to declare new uses gives him implied authority to do so.

Powers of sale—
Minerals.
Timber.

Under the ordinary power of sale and exchange, trustees cannot sell the lands without the timber, nor allow the tenant for life unimpeachable for waste to sell the timber, nor can they sell land reserving the minerals, for to do so would be to prejudice the reversioner (*u*). Sir J. Romilly, M.R., said (*x*):—

(*n*) Co. Litt. 237*a*.
(*o*) *Ib.*
(*p*) Vol. ii. 335.
(*q*) Farwell, 215.
(*r*) Elph. Introd. 356.
(*s*) Elph. Introd. 345.
(*t*) Elph. Introd. 352.
(*u*) *Cholmeley* v. *Paxton*, 3 Bing. 207.
(*x*) *Buckley* v. *Howell*, 29 Bea. 552. See, as to this case, Dart, V. & P. 1296, 1297.

"The principle is this:—The power must be so exercised as not to give the tenant for life more out of the property subject to the power than he would have had if the power had not been exercised. The mines are a part of the *corpus*, which the tenant for life, being unimpeachable for waste, is entitled to win and sell, and thus obtain the profits of; but the surface land being sold, the purchase-money is to be reinvested in land, and if an estate with valuable minerals under it were found to be the most eligible mode of investment, the tenant for life would get the minerals from under the two estates. It is clear that this could not be prevented, for the Court could not refuse to allow the purchase-money to be invested in the purchase of an estate with minerals under it, if such a purchase were valuable and beneficial for the persons entitled; neither could it restrict the purchase to lands of which the mere value was agricultural, or if not, prevent the tenant for life from working the mines.

"It is obvious that the Court could not exact from the tenant for life any promise not to purchase any land of that description, nor, if exacted, enforce it. It is the same in this case as in that of timber; no promise or undertaking as to reinvestment would be of any avail, nor could it be enforced by this Court.

"I think the principle clear, that in selling a piece of this land, you must sell the whole of the minerals under it as well as the surface of the land itself."

Confirmation of Sales Act.

The Confirmation of Sales Act (*y*) cured the invalidity of past sales, under such a power, of the land separately from the minerals, or of the minerals separately from the land, excepting sales declared invalid, or sales as to the validity of which litigation was pending (*z*); and for the future empowered trustees so to sell with the sanction of the Court of Chancery, to be obtained on petition in a summary way, and such sanction, once obtained, renders further application unnecessary in respect of any part or parts of the land comprised in the order (*a*).

Now it is provided that on sales of settled estates authorised by the Court under the Settled Estates Act, 1877 (*b*), any earth, coal, stone, or mineral may be excepted, and (*c*) any timber (not being ornamental timber) growing on any settled estates, may be sold, if the Court deem it proper and consistent with a due regard for the interests of all parties entitled under the settlement.

And the Settled Land Act, 1882 (*d*), enacts that on a sale,

(*y*) 25 & 26 Vict. c. 108. See Dart, V. & P. 77, 1296; Seton on Decrees, 1258, 1259; Pemberton on Judgments, 846.

(*z*) S. 1.

(*a*) S. 2. See *Re Hirst's Mtge.*, 45 Ch. D. 263; *Re Wadsworth's Trusts*, W. N. 1890, p. 163.

(*b*) 40 & 41 Vict. c. 18, s. 19.

(*c*) S. 16.

(*d*) 45 & 46 Vict. c. 38; see *ante*, chap. ii., pp. 48, *et seq.*

exchange, or partition under the Act, any reservation with respect to mines and minerals may be made (*e*).

Proceeds of timber paid by mistake to tenant for life.

Reference should here also be made to the section in the Act known as Lord St. Leonards' Act, 1859 (*f*), as to cases of the mistaken payment to the tenant for life in respect of the timber, &c., viz., that—

> S. 13. "Where under a power of sale a *bona fide* sale shall be made of an estate with the timber thereon, or any other articles attached thereto, and the tenant for life or any other party to the transaction shall by mistake be allowed to receive for his own benefit a portion of the purchase-money as the value of the timber or other articles, it shall be lawful for the Court of Chancery, upon any bill or claim or application in a summary way, as the case may require or permit, to declare that upon payment by the purchaser, or the claimant under him, of the full value of the timber and articles at the time of sale, with such interest thereon as the Court shall direct, and the settlement of the said principal moneys and interest, under the direction of the Court, upon such parties as in the opinion of the Court shall be entitled thereto, the said sale ought to be established; and upon such payment and settlement being made accordingly, the Court may declare that the said sale is valid, and thereupon the legal estate shall vest and go in like manner as if the power had been duly executed, and the costs of the said application as between solicitor and client shall be paid by the purchaser or the claimant under him."

Extinguishment or suspension and release of powers.

The distinction between powers "simply collateral" and other powers is important with respect to their extinguishment or suspension and release. For a power simply collateral cannot be extinguished or suspended by any act of the donee, or of any other persons, with respect to the land; nor can it be released where it is to be exercised for the benefit of another (*g*). But a simply collateral power given to a trustee, as such, is incapable of being exercised by him after he has ceased to be a trustee (*h*). On the other hand, powers collateral and in gross, and powers relating to the land, whether appendant or in gross, may be suspended or destroyed by the donee (*i*). In *West* v. *Berney* (*k*), Leach, V.-C., said:—

West v. *Berney.*

"Upon the authorities and principle my opinion is, that a power

(*e*) S. 4 (6), and s. 17.

(*f*) 22 & 23 Vict. c. 35, s. 13. This was enacted in consequence of the decision in *Cockerell* v. *Cholmeley*, 1 Russ. & M. 418; and see *Cholmeley* v. *Paxton*, 3 Bing. 207.

(*g*) Farwell on Powers, p. 10.

(*h*) Elph. Introd. 433.

(*i*) Farwell on Powers, p. 13.

(*k*) 1 Russ. & M. 430.

simply collateral, that is, a power to a stranger, who has no interest in the land, cannot be extinguished or suspended by any act of his own or others with respect to the land. It is clear, too, that it cannot be released, where it is to be exercised for the benefit of another.

"It must be equally clear that it may be released, where it is for his own benefit, as a power to charge a sum of money for himself. In such case his joining in a conveyance of the land clear of the charge, would be a release. I think that every power reserved by the grantor, whether he has retained an interest in the estate as tenant for life or otherwise, is an interest in him, which may be released or extinguished. It differs altogether from a naked authority given to a mere stranger. It is so much reserved by him out of the estate. I think that every power reserved to a grantee for life, though not appendant to his own estate as a leasing power, but to take effect after the determination of his own estate, and therefore, in gross, may be extinguished. In respect of his freehold interest he can act upon the estate, and his dealing with the estate so as to create interests inconsistent with the exercise of his power, must extinguish his power. The general principle is, that it is not permitted to a man to defeat his own grant. Such a power in gross in tenant for life would not be defeated by a conveyance of his life estate as a power appendant or leasing power would be defeated; because the conveyance of his life estate is not inconsistent with the exercise of his power" (*l*).

A power given to the owner of a particular estate, whether appendant or in gross, is extinguished by his acquiring the fee simple (*m*), or when the purposes for which it was created no longer exist (*n*).

Release under Conveyancing Act, 1881.

By the Conveyancing and Law of Property Act, 1881 (*o*), a person to whom any power, whether coupled with an interest or not, is given, may by deed release, or contract not to exercise the power.

Disclaimer under Conveyancing Act, 1882.

And by the Conveyancing Act, 1882 (*p*), it is further provided that a person to whom any power, whether coupled with an interest or not, is given, may by deed disclaim the power, and "on such disclaimer the power may be exercised by the other or others, or the survivors or survivor of the others, of the persons to whom the power is given, unless the contrary is expressed in the instrument creating the power."

Powers:— 1. Exclusive

A power of appointment among a class which authorises the donee to select one or more members of the class to the exclusion

(*l*) See also *Smith* v. *Death*, 5 Madd. 371.

(*m*) *Cross* v. *Hudson*, 3 Bro. C. C. 30.

(*n*) *Wheate* v. *Hall*, 17 Ves. 80. See on this point a series of articles "On the Duration of Powers and Trusts for Sale," 32 Solicitors' Journal, 684 *et seq.*

(*o*) 44 & 45 Vict. c. 41, s. 52. But it has been held that a power coupled with a duty cannot be released; *Re Eyre*, W. N. 1883, p. 153, 49 L. T. 259.

(*p*) 45 & 46 Vict. c. 39, s. 6.

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2. Non-exclusive.

of the others, is called an Exclusive power; one which does not allow the entire exclusion of any one member is called a Non-exclusive power.

In marriage settlements of real estate, an exclusive power of appointment among the children of the marriage may take the form following:—

"To the use of the child or of all or such one or more exclusively of the others or other of the children of the said intended marriage for such estates or estate interests or interest and if more than one in such shares and with and subject to such charges powers provisoes conditions restrictions limitations and remainders over for the benefit of the said children or some or one of them and in such manner as the said (parents) shall by any deed or deeds or writing or writings sealed and delivered with or without power of revocation and new appointment appoint" (q).

Under the law prior to the statute next mentioned, it was held in equity, that the donee of a non-exclusive power must appoint a substantial share to each object of the power; though at law, if anything, however small, were appointed, the requirement of the power was satisfied (r).

11 Geo. IV. & 1 Wm. IV. c. 46.

An Act, passed in 1830 (s), provided that—

"No appointment which from and after the passing of this Act shall be made in exercise of any power or authority to appoint any property, real or personal, amongst several objects, shall be invalid or impeached in equity on the ground that an unsubstantial, illusory, or nominal share only shall be thereby appointed to or left unappointed to devolve upon any one or more of the objects of such power; but that every such appointment shall be valid and effectual in equity as well as at law, notwithstanding that any one or more of the objects shall not thereunder, or in default of such appointment, take more than an unsubstantial, illusory, or nominal share of the property subjected to such power."

But even after this Act an appointment was bad if it omitted any object of the power, though the appointment of a shilling, or even a farthing, would satisfy the Act in this respect (t).

37 & 38 Vict. c. 37.

Appointments to be valid notwithstanding one or more objects excluded.

In 1874, therefore, it was enacted (u)—

"S. 1. That no appointment, which, from and after the passing of this Act, shall be made in exercise of any power to appoint any property real or personal amongst several objects, shall be invalid

(q) 3 Da. ii. 1236; Dav. Conc. Prec., 459, for a short form.

(r) Farwell on Powers, 302.

(s) 11 Geo. IV. & 1 Wm. IV. c. 46, s. 1.

(t) *Gainsford* v. *Dunn*, L. R. 17 Eq. 406.

(u) 37 & 38 Vict. c. 37.

at law or in equity on the ground that any object of such power has been altogether excluded, but every such appointment shall be valid and effectual notwithstanding that any one or more of the objects shall not thereby, or in default of appointment, take a share or shares of the property subject to such power.

"S. 2. Provided always, that nothing in this Act contained shall prejudice or affect any provision in any deed, will, or other instrument creating any power, which shall declare the amount or the share or shares from which no object of the power shall be excluded, or some one or more object or objects of the power shall not be excluded."

But with regard to appointments made before the passing of this Act, *i.e.*, the 30th July, 1874, it is still necessary to consider the rules for construing a power as exclusive or as non-exclusive. Where a testatrix bequeathed a fund to her daughter for life, and after her death to and amongst her other children or their issue in such parts, shares, and proportions, manner and form as her daughter should by deed or will appoint; it was held that the power was exclusive. In that case (*x*) Jessel, M.R., said:—

"The real question is, what is the law upon the point as to whether this power is exclusive or not? Now, I am not going to lay down any new law on the subject of exclusive appointments, but I will take the law as enunciated in the most recent text-book on the subject—Mr. Farwell's work on Powers, published in 1874. Mr. Farwell says: 'Each case must depend upon the intention expressed in the particular instrument creating the power; no general rule can be laid down, except perhaps that the words "all and every" are mandatory, and make it necessary that each object should have a share, and that "such" authorises exclusion, unless a contrary intention appear' (*y*). I have no doubt that is the law. The Court must have regard to the intention expressed in the instrument creating the power, and that doctrine was not disputed at the bar. . . . . The question is one of construction. What is the general rule? I must first look at the instrument before me to see whether there are any words which prevent this power from being read as an exclusive power. There have been cases in which such words as 'all and every,' or 'unto or among,' have been held not to authorise an exclusive appointment. But the use of such expressions is not conclusive."

Excessive execution.

Where the interests attempted to be created in exercise of a power are either contrary to a rule of law or to the scope of the power, the execution is called "excessive."

Where it is attempted to create an interest offending against a rule of law, that interest is void. Thus, a power cannot be exercised so as to create a perpetuity, *i.e.*, to tie up an estate

(*x*) *In re Veale's Trusts*, 4 Ch. D. 64. (*y*) Farwell on Powers, 294.

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longer than the period allowed by law—that is to say, a life or lives in being and twenty-one years after, with an additional period for gestation, if it actually exists (z).

Estates take effect under instrument creating the power.

The limitations created under the exercise of powers are treated as taking effect under the instrument creating the power itself.

Perpetuities:—
1. General powers.

When the power is what is termed a "general power," as in the case of a power to A. to appoint generally without restriction in his choice of objects, in considering the application of the rule against perpetuities, he is regarded as absolute owner of the property—in other words, the time from which the period allowed by the rule is to be reckoned, is the time when the instrument executing the power takes effect, *i.e.*, the time of execution, if it is a deed, the death of the testator, if it is a will (a). But when the power is a "particular" or "special" power—that is, where the objects of it are specified persons or a specified class of persons, the donee cannot create any estate which might not have been created by the instrument containing the power (b).

2. Special powers.

To quote Mr. Lewis (c):—

"A particular power may embrace objects of any degree of remoteness; *i.e.*, such a power will not be void, because it attempts to authorise an appointment to persons, not necessarily born, or the creation of interests, not necessarily vested, within the fixed boundaries of perpetuity. The power itself not giving any right, or creating any definite interest, no danger ensues from the range of choice or selection extending to objects, whom the law would not allow to participate in an express gift. The possible exercise of the power, in favour of such objects, only answers to the chances of abuse, which attend the power of dominion possessed by a person absolutely entitled, but which have never been supposed to justify the total deprivation of that power, or to disallow its exercise within temperate limits. Did the rules of law require an exercise of the power in favour of every person answering to the description of the objects embraced by it, or did the conferring a power of appointment among a class of persons, operate as an implied gift to all the members of that class, in default of the exercise of the power, arguments would exist against extending a power to persons who could not legally participate in any direct gift, contemporaneous with, or made instead of, the power. The security against the violation of the laws of remoteness consists in the very discretion and latitude of choice with which the donee of the power is invested by it, and in the failure and nullification of his dispositions, consequent upon an abuse of that discretion.

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(z) See *ante*, pp. 97, 275.

(a) Notes to *Cadell* v. *Palmer*, Tudor, L. C. R. P. 485. It has been decided, after some difference of judicial opinion, that this rule applies to the exercise of a general power by a married woman, *Rous* v. *Jackson*, 29 Ch. D. 521.

(b) Farwell on Powers, 226; and 3 Da. i. 154, note.

(c) Lewis on Perpetuities, pp. 487 *et seq.*

"But, although there is no necessity to confine the objects of a power to those who might be legally included in an express gift of the same date, it is a long-established rule that no estate or interest can be limited under a particular power, which would have been too remote, if limited in the deed or will creating the power. The office of discrimination belongs to the donee of the power; and if properly discharged, by the appointment of interests which would have been valid in the original instrument, the circumstance that the power embraced other objects too remote, will not affect the appointment; but if the appointment extend to persons, or create interests beyond the boundaries of perpetuity, as tested by their insertion in the instrument creating the power, the appointment fails.

"Thus, if A. have a power of appointment among the issue of B., and he appoint to all the children of a son of B., who was unborn at the date of the instrument creating the power, the appointment is bad; because the grandchildren of B., comprised in it, will not necessarily be born, within the period of a life in being and twenty-one years, computed from the date of the original settlement.

"But, if the appointment be to such of the children of B.'s son as shall be born during the life of the donee of the power, or within twenty-one years from his decease, or before the expiration of twenty-one years from the decease of any other person, or the survivor of any number of persons, living at the time of the creation of the power, it will be entirely free from objection, because such a limitation would have been valid if contained in the original settlement or will. And so, if the appointment be to the children of B. (he having none when the power was created), on their attainment of the age of twenty-five years, or other age above majority, it will be void, as too remote, inasmuch as, under such a limitation, if inserted in the deed creating the power, the vesting of the interests of the children might have been suspended for a longer period than a particular life or number of lives in being, and twenty-one years. But if, by the appointment, the attainment of the required ages by the children of B. be confined to take place within the legal limits of remoteness, computed from the taking effect of the original will or settlement, it will be unobjectionable; as such restriction on the happening of the specified event, in itself too remote, would have sufficed to restrain its tendency to a perpetuity, if inserted in the instrument creating the power. It will be observed that, wherever the appointment is to the grandchildren or remoter issue of the person, in favour of whose issue the power was created, and the birth of the issue to take under the appointment is restricted to the period of twenty-one years after the expiration of any life or lives, the vesting of the interests of the issue must not be postponed beyond their birth, as the whole period of the perpetuity-boundary is absorbed by the contingency which surrounds the objects of the gift. If, therefore, it be desired to suspend the vesting of the shares of the issue till their majority, care must be taken to provide that the issue, who are included under the appointment, shall be born during the life of the donee of the power, or during the lives of any persons living at the time of the creation of the power, and the life of the survivor."

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A good illustration of the above remarks is furnished by a recent case (*d*) :—

By a marriage settlement, freehold property was conveyed to trustees to the use of the settlor, William Metford, for life, and after his death, "to the use of all or any one or more exclusively of the children, grandchildren, or other issue of William Metford" (to be born before the appointment should be made), as he should by deed or will appoint, and in default to the uses therein declared. By his will, William Metford appointed the property to the use of his son, William E. Metford, in fee, but in case William E. Metford should have no child who should attain the age of twenty-one years, the testator requested him to grant, appoint, or devise to the use of his (the testator's) grandson, W. M. Badcocke, in fee. The question arose on the sale of a portion of the property whether William E. Metford had an absolute fee simple in the estate, and could make a good title without the concurrence of W. M. Badcocke.

Malins, V.-C., said :—

"The law is settled, that where a person takes property by virtue of the execution of a special or limited power of appointment, he takes directly under the instrument creating the power. Consequently, when William Metford made his will, it was the same as if the words he there used had formed part of the settlement, and as if the property had been conveyed by that settlement to trustees to the use of himself for life, with remainder to the use of his (unborn) son in fee, with a direction that in case his son should have no child who should attain twenty-one, then, that the estate should, after the son's death, go over to the settlor's grandson in fee. That is an attempt to make the property inalienable for a period which might extend to twenty-one years after the determination of the life of a person not in being at the date of the settlement. The law does not allow a man to tie up property for longer than a life or lives in being and twenty-one years; and this is clearly an attempt to do what is contrary to the law.

"My opinion, therefore, is, that the appointment by the testator to his son in fee is good, and the attempt to give the estate over is void. It is precisely the same as if a man were to give property to his son for life, and after his decease to his son's children, as tenants in common in fee, with a proviso that if any of the children should die under twenty-five the property should go over. In that case, the proviso carrying over the shares would be void. The gift to the son in fee is therefore good, and the executory devise over is void."

Excessive execution.

The principle on which executions of powers which are excessive, having regard to the scope of the powers, are dealt with was laid down by Sir Thomas Clarke, M.R. (*e*), as follows :—

"Where there is complete execution of a power, and something

(*d*) *In re Brown & Sibly's Contract*, 3 Ch. D. 156. It was on a different point that the decision of the V.-C. was dissented from by Jessel, M.R., in *In re Ellis's Trusts*, 5 Ch. D. 504.

(*e*) In *Alexander* v. *Alexander*, 2 Ves. Sen. 640; Tudor, L. C. R. P. 395.

ex abundanti added, which is improper, there the execution shall be good, and only the excess void; but where there is not a complete execution of a power, where the boundaries between the excess and execution are not distinguishable, it will be bad" (*f*).

Valid appointment to persons not objects of the power.

A valid appointment may, however, be made to persons not objects of the power, with the concurrence of those who are objects; thus, upon the marriage of a child, a parent with power to appoint among his children, may, with the consent of the child, appoint to the intended husband and the issue of the marriage, and the appointment will be valid in equity. Such an arrangement is regarded first as an appointment, and then as a settlement by the object of the power (*g*).

To separate use without power of anticipation.

A question has arisen whether, where there is a power of appointment among children and in exercise of such power an appointment is made to daughters to their separate use without power of anticipation, the appointment can be upheld or is void for remoteness. There are decisions that the appointment, so far as it is to their separate use, is good, but that, so far as it restrains anticipation, it is excessive and must be rejected (*h*). But these decisions were disapproved by Sir G. Jessel, M.R., in a case in which, sitting as a judge of first instance, he felt himself bound to follow them (*i*).

Power of attorney.

A power of attorney is an authority from one person to do an act in the turn, stead, or place of another: as, in the case of a feoffment, a letter of attorney to deliver seisin to the feoffee, which must be by deed, and must be executed in the lifetime of the donor (*k*). Hence it came to be necessary in making out title to property that, where any deed had been executed by attorney, the power should be produced and evidence given of the principal having been alive at the time of its being acted upon (*l*). Where it has not been given for valuable consideration, it is also revocable at any time by the donor, and is liable to be suspended by his mental incapacity; therefore, in every such case, it was further

Requirements for validity of exercise.

(*f*) See as to numerous questions arising under this rule, Farwell on Powers, 232 *et seq.*

(*g*) See Farwell on Powers, 336; *Re Turner's Settled Estates*, 28 Ch. D. 205.

(*h*) Farwell on Powers, 229, and cases there cited.

(*i*) See *per* Jessel, M.R., in *In re Ridley*, 11 Ch. D. 645. (This case should also be consulted for the discussion by the M.R. of the doctrine of restraint on anticipation.) See also *Cooper* v. *Laroche*, 17 Ch. D. 368; *Herbert* v. *Webster*, 15 Ch. D. 610 (where the settlement was post-nuptial and the daughters were living when it was made).

(*k*) Co. Litt. 51*b*, 52*b*.

(*l*) Note to *Smart* v. *Sanders*, 5 C. B 917; and Dart, V. & P. 352.

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necessary that inquiry should be made whether the power had been revoked prior to its apparent or proposed exercise (*m*). Where the conveyance, on sale or mortgage, is executed by attorney, the practice has been to retain, or deposit in the names of trustees at the risk of the vendor or mortgagor, the purchase or mortgage-money, until satisfactory evidence has been adduced of the validity of the power at the date of the execution of the conveyance (*n*).

Where a deed is executed under power of attorney, the principal and not the attorney is named as party to the deed, and the custom has been for the attorney to execute in the name of the principal, and the fact to be noticed in the attestation (*o*).

A married woman could not formerly appoint an attorney except, perhaps, with the consent of her husband (*p*), and, therefore, any assurance of a married woman's interest under a power of attorney was inoperative (*q*).

The power cannot be delegated (*r*), nor can a deputy be appointed by the attorney, unless the deed conferring the power expressly authorises such delegation or appointment (*s*).

22 & 23 Vict. c. 35.

The Legislature first interfered to afford protection to trustees and personal representatives, making payments or doing acts in pursuance of a power of attorney. It was enacted by the Act known as Lord St. Leonards' Act, 1859 (*t*), as follows:—

> S. 26. No trustee, executor, or administrator, making any payment or doing any act *bonâ fide* under or in pursuance of any power of attorney, shall be liable for the moneys so paid or the act so done, by reason that the person who gave the power of attorney was dead at the time of such payment or act, or had done some act to avoid the power, provided that the fact of the death, or of the doing of such act as last aforesaid, at the time of such payment or act *bonâ fide* done as aforesaid by such trustee, executor, or administrator, was not known to him: Provided always, that nothing herein contained shall in any manner affect or prejudice the right of any person entitled to the money against the person to whom such payment shall have been made, but that such person so entitled shall have the same remedy against such person to whom such payment shall be made as he would have had against the trustee, executor,

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(*m*) *Ib.*, *and* 641.

(*n*) Dart, V. & P. 748.

(*o*) Dart, V. & P. 589 and 642. See form in 1 K. & E. 651.

(*p*) *Cooper's Case*, 2 Leon. 200; —— v. *Hopkins*, Cro. Car. 165. See also *White* v. *Greenish*, 11 C. B. N. S. at p. 230.

(*q*) *Graham* v. *Jackson*, 6 Q. B. 839, *per* Patteson, J.; and Dart, V. & P. 642.

(*r*) *Ante*, p. 293.

(*s*) See 1 Da. 476, note.

(*t*) 22 & 23 Vict. c. 35.

or administrator, if the money had not been paid away under such power of attorney.

Conveyancing Acts, 1881, 1882.

This protection, as regards payments and acts done after 1881, has been extended by the Conveyancing and Law of Property Act, 1881 (*u*), to all persons acting *bonâ fide*. It is still, however, necessary, except in the cases provided for by the Conveyancing Act, 1882 (*x*), for a purchaser (*y*) to ascertain the facts of the principal being alive and the power being in force at the time of the conveyance being executed, for otherwise he would obtain only an equitable title. The cases provided for by the Conveyancing Act, 1882, are in favour of purchasers, where the power of attorney has been created by an instrument executed after 1882, and either is given for a valuable consideration, and in the instrument creating it is expressed to be irrevocable (*z*), or, whether given for a valuable consideration or not, is in the instrument creating it expressed to be irrevocable for a fixed time therein specified, not exceeding one year from the date of the instrument (*a*).

Again, by the Conveyancing and Law of Property Act, 1881 (*b*), it is enacted that the donee of a power of attorney may, at whatever date the power was created, if he thinks fit, execute any assurance, instrument or thing in and with his own name and signature and seal, by the authority of the donor of the power. And further, by the same Act (*c*), as regards deeds executed after 1881, a married woman, whether an infant or not, is authorised to appoint an attorney to execute any deed, or do any other act which she might herself execute or do.

(*u*) 44 & 45 Vict. c. 41, s. 47.

(*x*) 45 & 46 Vict. c. 39, ss. 8, 9.

(*y*) "Purchaser" in the Conveyancing Acts, 1881, 1882, includes a lessee or mortgagee and an intending purchaser, lessee, or mortgagee, or other person who for valuable consideration takes or deals for any property: 44 & 45 Vict. c. 41, s. 2 (viii.); and 45 & 46 Vict. c. 39, s. 1 (4) (ii.).

(*z*) 45 & 46 Vict. c. 39, s. 8.

(*a*) *Ib.* s. 9.

(*b*) 44 & 45 Vict. c. 41, s. 46.

(*c*) S. 40.

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CHAPTER XII.

COPYHOLDS.

"TENANT by copy of Court Roll is, as if a man be seised of a manor, within which manor there is a custom which hath been used time out of mind of man, that certain tenants within the same manor have used to have lands and tenements to hold to them and their heirs in fee simple, or fee tail, or for term of life, &c., at the will of the lord, according to the custom of the said manor (*a*)."

A manor (*b*) is an aggregate of rights vested in the lord, including rights in respect of lands, and also certain rights of jurisdiction (*c*). The lands comprised within the manor are either—(1) *demesne* lands (*d*), of which the freehold is vested in the lord, or (2) *tenemental* lands, which are lands held of the lord by freehold tenants, and in regard to which the lord has a seignory, and is entitled to the services by which they are holden (*e*). The demesne lands comprise lands in the occupation of the lord himself or of his lessees for years, or of his customary tenants, and also the waste lands. The rights of the lord in the waste lands are generally subject to rights of common (*f*) enjoyed by the tenants of the manor, whether freeholders or customary tenants.

It is essential to the existence of a manor that there should

(*a*) Litt. s. 73. Some interesting information as to the origin of copyholds will be found in Seebohm, Eng. Village Community, *passim*; Maine, Village Communities, Lect. 3 and 5; Early Law and Custom, pp. 302, 319 (and note), 329. See also 1 Cruise, Dig. 42, and as to copyholds generally, 1 Cruise, Dig. Tit. X., pp. 253 *et seq.*; Watkins on Copyholds.

(*b*) See Elph. N. & C. Interp. 592, s.v. *Manor*; Perk. Prof. Bk. s. 128; Burton, Comp. (1023); Watkins on Copyholds, 4th ed. 26; 15 Vin. Ab. "Manor."

(*c*) As to the Courts of the manor, see Co. Litt. 58*a* *et seq.*; 4th Instit. 268; 2 Selden Society's Publ.; 5 Law Quarterly Rev. 123; 7 Vin. Ab. "Court," E.a.

(*d*) See as to the meaning of *demesnes*, Elph. N. & C. Interp. p. 570.

(*e*) See Co. Litt. 17*a*; *A.-G.* v. *Parsons*, 2 Cr. & J. 279.

(*f*) See as to these, *post*, p. 335; and Williams on Rights of Common.

be freehold tenants holding of the lord, and therefore every manor must have been created before the Statute of *Quia Emptores* (18 Ed. I., A.D. 1289—90), since no subject could after that statute grant a freehold estate in fee simple to be holden of himself (*g*).

In most manors there are lands held by customary tenants, and known as copyholds. These are part of the demesnes, and the freehold and seisin are in the lord (*h*). The lord is therefore the terre tenant of copyhold lands with respect to the Crown or other chief lord of whom the lands are held; and the timber trees upon the land, and the minerals under it, belong, not to the copyholder, but to his lord, who, however, in the absence of custom "cannot get either the one or the other, so that the minerals must remain unworked and the trees uncut. The possession is in the copyholder, the property is in the lord (*i*)."

Timber and minerals.

In some manors there is a custom for the lord, sometimes with the consent of the homage (*k*), to grant new copyholds out of the waste (*l*), but by the Copyhold Act, 1887, no such grant made after the 16th September, 1887, is valid without the consent of the Board of Agriculture (*m*), and the effect of such a grant since that date is that the land "shall cease to be of copyhold tenure," and shall be vested in the grantee to hold "as in free and common socage (*n*)."

Grants of the waste.

The services due from the copyhold tenants depend upon the various customs of the different manors. They invariably include fealty and suit of Court; they sometimes include a rent,

(*g*) There may be an exception in the case of manors created by tenants *in capite* with licence from the Crown; *Delacherois* v. *Delacherois*, 4 N. R. 501; S.C. not reported on this point, 11 H. L. C. 62.

(*h*) Wms., R. P. 406.

(*i*) *Per* Jessel, M.R., *Eardley* v. *Granville*, 3 Ch. D. 826, 832.

(*k*) The "homage" properly speaking appears to mean the freeholders assembled in the Court Baron (of which they were judges), as freeholders alone can do homage to the lord, see Butler, Co. Litt. 64*a*, note 1. But as the Court of the freeholders and the customary Court (in which the steward was judge, and which was attended by a jury of copyholders) were often, if not generally, held together, the consent of the homage acquired the meaning of consent of the tenants of the manor, whether freeholders or copyholders, given in the manor Court. For an instance of the "homage" being a jury of copyholders, see *Lascelles* v. *Onslow*, 2 Q. B. D. 433.

(*l*) 1 Cruise, Dig. 263; Williams on Rights of Common, 123, 129. See, as to the necessity of holding a Court in such cases, 4 & 5 Vict. c. 35, s. 91.

(*m*) Substituted by 52 & 53 Vict. c. 30, for the Land Commissioners.

(*n*) 50 & 51 Vict. c. 73, s. 6.

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a relief payable on the death of the tenant, a fine (often improperly called a relief) payable on alienation; and a heriot on the death of, or on alienation by, a tenant, or sometimes on his alienation only (*o*).

Though no copyholder has, at common law, more than an estate at will, yet copyholders may have customary estates for life or of inheritance, analogous to estates in freehold lands, and they are then spoken of as tenants for life, in tail, or in fee-simple, as the case may be (*p*).

Estate tail in copyholds.

The question whether copyholds could be granted for an estate in tail was formerly much debated (*q*). It is now settled that such an estate can be created only in manors in which there is a special custom to that effect (*r*), and that the *onus* of proving the custom lies on the person who sets it up (*s*). Where there is no such custom, words of limitation which create an estate tail in freeholds create a fee-simple conditional in copyholds (*t*).

Mode of alienation.

As copyholders are in law mere tenants at will, they cannot alienate their estates by feoffment or any other common law assurance. And the Statute of Uses does not apply to copyholds, because the copyholder is not seised of them.

Surrender and admittance.

By the custom of the manor, the copyholder has the power of transferring his estate, by surrendering it to the lord to the intent that the lord may grant it out to another person named in the surrender (*u*). The new grant by the lord is called an admittance. The surrenders and admittances are entered in the rolls of the Manor Court, and copies of these entries are the evidences of title of the tenant, whence he is said to hold by copy of Court Roll.

In most manors the process of conveyance formerly consisted of three parts; *first*, a surrender by the tenant to the lord to such uses (*x*) for such persons as were specified in the surrender; *second*, a presentment on oath by the jury, or homage, of the

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(*o*) Scriven on Copyholds, 210 *et seq.*

(*p*) See Litt. ss. 77, 81; Co. Litt. 60*b*, 62*b*.

(*q*) See Co. Litt. 60*b*.; 1 Cruise, Dig. 273 *et seq.*; Wms. R. P. 411 *et seq.*; and the authorities collected in Scriven on Copyholds, 40.

(*r*) *Roe* d. *Crowe* v. *Baldwere*, 5 T. R. 104; *Heydon's Case*, 3 Rep. 7*a*; Litt. s. 73.

(*s*) *Moore* v. *Moore*, 2 Ves. Sen. 602.

(*t*) Elph. N. & C., Interp. 241; *Re Catling's Estate*, W. N. 1890, p. 75; *Doe* v. *Clark*, 5 B. & Ald. 462.

(*u*) See form of surrender in 1 K. & E. 463.

(*x*) The word "use" is here used somewhat in its old sense of "trust," and as indicating that the lord was bound to admit the persons specified.

manor in open Court; and *third*, the admittance of the new tenant by the lord, consisting of a grant of the land to him to hold by the rents and services "therefor due and of right accustomed," followed by symbolical delivery of the land by handing to the new tenant a rod, or verge (*y*), or a glove or some other thing, as the custom required, and by entry of the admission on the Court Rolls.

Covenant to surrender.

In practice, on a sale of copyholds, the vendor enters into a covenant to surrender to the use of the purchaser (*z*), which does not of itself confer any legal estate on the purchaser.

Any person who can convey freehold land by a common law assurance can surrender his copyhold (*a*).

Husband and wife.

A surrender might always be made by a man to the use of his wife, because the wife takes by the admittance, which is the act of the lord (*b*). In the absence of a special custom, husband and wife can surrender the wife's copyholds if she be privately examined by the steward; but by special custom the examination may be taken by two copyholders of the manor (*c*). If the wife acquired the copyhold after 1882, she can surrender it without her husband's concurrence by virtue of the Married Women's Property Act, 1882 (*d*).

Surrender before admittance.

In general a man cannot surrender until he has been admitted; but this rule is subject to two exceptions, viz.:—(1) The customary heir can surrender before admittance, but he must pay the fine due on the descent to him (*e*); (2) admittance of a tenant for life or years is a sufficient admittance of the remainderman (even if his estate was originally contingent) to enable the latter to surrender (*e*); but he must pay the fine where there is a custom to pay two fines, one on the admittance of the tenant for life and the other on the admittance of the remainderman.

(*y*) Hence copyholders are sometimes called tenants "by the verge;" Co. Litt. 61*a*.

(*z*) See forms in Dav. Conc. Prec. 137; 1 K. & E. 461.

(*a*) 5 Cruise, Dig. 450. An infant may be bound by his surrender under a special custom; *Hughes* v. *Carpenter*, Toth. 278; *Lyde* v. *Semister*, Toth. 173; *Nayler* v. *Strode*, 2 Rep. Ch. 392. If there is no such custom of the manor, his surrender is voidable, and not *ipso facto* void, where it be either beneficial to him or beneficial to others and not harmful to him; *Zouch* v. *Parsons*, 3 Burr. 1806; *Grange* v. *Tring*, O. Bridg. 117.

(*b*) *Bunting* v. *Lepingwell*, 4 Rep. 29*a*.

(*c*) *Driver* d. *Berry* v. *Thompson*, 4 Taunt. 294.

(*d*) 45 & 46 Vict. c. 75

(*e*) *Brown's Case*, 4 Rep. at 22*b*.

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Equitable interest.

A person entitled to a mere equitable interest cannot surrender, except where he is entitled to an equitable estate tail, in which case he can bar it by surrender under the Fines and Recoveries Act (*f*).

Tenant for life.

A tenant for life (or person having under the Settled Land Act, 1882 (*g*), the powers of a tenant for life) can, on a sale, exchange, partition, lease, mortgage, or charge, made under the powers conferred by the Act, convey by deed settled copyholds vested in trustees. The deed must be entered on the Court Rolls, and a person whose title under the deed requires to be perfected by admittance is entitled to be admitted without any surrender (*h*).

Surrender out of Court.

A surrender may be made out of Court to the steward or deputy steward (*i*), even if appointed by parol only (*k*). It was formerly necessary that such surrenders should be presented at the next Court; and, if not so presented, it became void (*l*), unless the custom allowed it to be presented at a subsequent Court (*m*). But, by the Copyhold Act, 1841 (*n*), entry on the Court Rolls is now sufficient without presentment. In some manors by special custom the surrender may be made out of Court to two or three of the copyholders, or to the bailiff or reeve (*o*).

Surrenders and admittances by attorney.

A copyholder could always surrender by attorney; but formerly he could not insist upon being admitted by attorney, because he could not do fealty by attorney. Since September 16, 1887, he is entitled under the Copyhold Act, 1887 (50 & 51 Vict. c. 73, s. 2) to be admitted by his attorney, appointed orally or in writing.

At common law a grantee not in existence at the time of the grant cannot take. But if a surrender of copyholds be made to the use of a person not in existence at the time of the surrender, or not then capable of taking, it takes effect if he be in existence or capable of taking at the time of the admittance.

(*f*) 3 & 4 Wm. IV. c. 74, s. 50.

(*g*) 45 & 46 Vict. c. 38, s. 20 (1), (3).

(*h*) *Ib.* s. 28 (3).

(*i*) *Parker* v. *Kett*, 1 Ld. Raym. 658.

(*k*) *Lady Holcroft's Case*, 4 Rep. 30*a*.

(*l*) Co. Litt. 62*a*. The vendor's solicitor is often appointed deputy steward for the purpose of taking his surrender.

(*m*) *Fawcett* v. *Lowther*, 2 Ves. at p. 302. "Presentment is properly that which the jurors find and present to the Court without any former indictment delivered to them"; Coke, 2nd Instit. 739.

(*n*) 4 & 5 Vict. c. 35, s. 89.

(*o*) Co. Litt. 59*a*. As to surrender by attorney, see *Combes' Case*, 9 Rep. 75*a*; *Mitchel* v. *Neale*, 2 Ves. Sen. 679.

For instance, a surrender to the use of the heir of A., a living person, is good if A. dies before the admittance (*p*).

A contingent remainder in copyholds is not destroyed by the surrender of the particular estate (*q*); but, on the other hand, where the estate is given to A. for life, with remainder to the heirs of B., and A. dies in B.'s lifetime, the heir cannot take. If, however, A. commits a forfeiture or surrenders, and afterwards B. dies in A.'s lifetime, the heir takes (*r*).

Curtesy.

The extent of the interest taken by a husband in his wife's copyholds depends upon the custom of the particular manor (*s*). The custom generally follows the rules of Common Law as to tenancy by the curtesy, and sometimes it is an estate during the joint lives of the husband and wife, and an estate in one moiety to the surviving husband so long only as he remains unmarried whether issue be born or not (*t*). Whatever be the custom, the rights of the husband are subject to the rights conferred on the wife by the Married Women's Property Act, 1882 (*u*).

Freebench (*x*).

The interest of a widow in her husband's copyholds, which is called "freebench," and is not affected by the Dower Act (*y*), depends upon the custom of the manor. Generally she takes a third for her life, as at common law; and generally she has freebench only in the lands of which her husband dies seised, so that a surrender by the husband, followed by admittance of the surrenderee even after his death, or a contract for sale made by the husband (*z*), will defeat the widow's freebench. Sometimes, however, she takes an estate greater or less than a third, even, in

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(*p*) Co. Cop. s. 35; Gilbert, Tenures, 263. The statement in some of the books that the admission of the tenant for life is the admission of the remainderman is not quite correct. It is so far his admission that it enables him to convey his interest by surrender during the lifetime of the tenant for life (*Auncelme* v. *Auncelme*, Cro. Jac. 31); but, on the death of the latter, the remainderman must be admitted, as the lord has a right to have a tenant on the Rolls; and on such admittance the remainderman must pay the customary fees; but, in cases where the tenant for life paid the full fine on his admission, the remainderman is not bound to pay a fine, unless the lord can prove affirmatively a custom to that effect (*Dean of Ely* v. *Caldecot*, 8 Bing. 439; *Rex* v. *Lord of the Manor of Woodham Walter*, 10 B. & S. 439). The admission of the tenant for life is not the admission of the reversioner (*Dell* v. *Higden*, Moo. 358).

(*q*) Fearne, C. R. 319.

(*r*) *Ib.* 320.

(*s*) *Ever* v. *Aston*, Moo. 271.

(*t*) Scriven on Copyholds, 70; 1 Cruise, Dig. 290.

(*u*) 45 & 46 Vict. c. 75.

(*x*) Scriven on Copyholds, 65 *et seq.*; 1 Cruise, Dig. 284 *et seq.*

(*y*) 3 & 4 W. IV. c. 105; *Smith* v. *Adams*, 5 De G. M. & G. 712.

(*z*) *Hinton* v. *Hinton*, 2 Ves. Sen. 631.

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one instance at least, the entire inheritance; and sometimes by marriage she acquires an inchoate title to freebench which will not be barred by her husband's alienation. As the widow's freebench is a continuation of the husband's estate, she does not (except by special custom) require to be admitted (*a*).

Descent.

Most copyhold tenements are descendible according to the custom of the manor, and, subject to the custom, according to the rules of the common law (*b*).

Devise of copyholds.

Before the 12th July, 1815, copyholds could not be devised except in manors where there was a special custom. In manors where there was no such custom, the copyholder made a surrender to the use of his will, and the estate passed by the surrender and not by the will, which merely operated as a declaration of the uses of the surrender (*c*). By 55 Geo. III. c. 192, all devises thereafter made of copyholds, though not surrendered to the use of the testator's will, were rendered as valid as if they had been so surrendered. This Act gave no new testamentary power, but merely supplied the want of a surrender.

Before 1838 a devise by a surrenderee of copyholds, made before his admittance, did not pass the legal estate (*d*); but the heir of the deceased tenant on the roll could devise before admittance (*e*). The law was altered by the Wills Act (7 Wm. IV. & 1 Vict. c. 26), which (s. 2) enables a person by his will, made or revived after 1837, to dispose of all real estate "to which he shall be entitled, either at law or in equity, at the time of his death, and which, if not so devised, bequeathed, or disposed of, would devolve upon the heir at law or customary heir of him, or, if he became entitled by descent, of his ancestor." In the case of copyholds, the estate vests in the heir until the admittance of the devisee (*f*); and a devise has the same effect as if a surrender had been actually made to the use of the will (*g*).

It has been decided that a copyholder may give a power of sale

(*a*) *Chapman* v. *Sharpe*, 2 Show, 184.

(*b*) *Brown's Case*, 4 Rep. at 22*a*.

(*c*) *Semaine* v. *Anon.*, 1 Bulst. 200; *Att.-Gen.* v. *Vigor*, 8 Ves. at p. 286.

(*d*) *Wainewright* v. *Elwell*, 1 Madd. 627.

(*e*) *Right* d. *Taylor* v. *Banks*, 3 B. & Ad. 664.

(*f*) *Garland* v. *Mead*, L. R. 6 Q. B. 441.

(*g*) *Lacey* v. *Hill*, L. R. 19 Eq. 346. Though an unadmitted devisee or surrenderee can devise the copyhold, his devisee takes no legal interest, even if he is admitted; *Matthew* v. *Osborne*, 13 C. B. 919, a case worthy of careful perusal.

to his executors, or other persons named in that behalf in his will (*h*), and that, if they can sell under the power before the lord can seize *quousque* (*i*), their appointee has a right to be admitted without any admittance of and surrender by the devisee or heir. There is, however, no reason to think that, in the absence of special custom, a devise of copyholds "to such uses as A. shall appoint, and, in default of appointment, to the use of A." or "of B.," would enable A. by an exercise of the power, to confer on his appointee a right to be admitted, so as to avoid the necessity of some person being admitted who would afterwards surrender to the use of the appointee (*k*).

The lord is a mere instrument in admitting the tenant; and therefore if there be a discrepancy between the surrender and the admittance as to the person admitted, the estate for which he is admitted, or otherwise, the admittance is good only so far as it is in accordance with the surrender (*l*).

Admittance relates back to surrender.

Until admittance the surrenderee has only an equitable interest, but on admittance he acquires the legal estate as from the time of the surrender as against all persons except the lord (*m*). The result is, that if the surrenderor dies before the admittance of the surrenderee, his widow is not entitled to freebench; and that, if he is a joint tenant, the joint tenancy is severed by the surrender. Conversely, if the surrenderee in fee dies before admittance, his widow is entitled to freebench (*n*), and his heir is entitled to be admitted.

Mortgages of copyholds.

Mortgages of copyholds are generally effected by means of a covenant to surrender followed by a conditional surrender (*o*), which is at once entered on the Court Rolls. It results from the principles above laid down that, if the mortgagee is admitted in pursuance of the surrender, he obtains priority over all estates created by surrenders subsequent to the conditional surrender, even if admittances have been made upon them.

The lord is not bound to admit on a surrender which is

(*h*) *Beal* v. *Shepherd*, Cro. Jac. 199; *Holder* v. *Preston*, 2 Wils. 400; *Glass* v. *Richardson*, 9 Hare, 698; S.C., 2 D. M. & G. 658; *Reg.* v. *Wilson*, 3 B. & S. 201.

(*i*) *I.e.*, until a tenant appear to claim admittance; see *Doe* v. *Trueman*, 1 B. & Ad. 736.

(*k*) See *Flack* v. *Downing College*, 13 C. B. 945.

(*l*) *Bunting* v. *Lepingwell*, 4 Rep. 29*a*; *Westwick* v. *Wyer*, 4 Rep. 28*a*.

(*m*) Co. Litt. 59*b*; *Porter* v. *Porter*, Cro. Jac. 100; *Benson* v. *Scot*, 1 Salk. 185; *Doe* v. *Hall*, 16 East, 208.

(*n*) *Vaughan* v. *Atkins*, 5 Burr. 2764.

(*o*) See forms in Dav. Conc. Prec. pp. 202, 203; 2 K. & E. 76, 79.

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contrary to the custom of the manor; nor to admit a corporation, because, as a corporation never dies, he would lose fines payable on the death of the tenant (*p*).

The heir of an unadmitted copyholder has a right to be admitted by descent (*q*).

Bankrupt.

The copyholds of a bankrupt vest in his trustee in bankruptcy, who, however, cannot be compelled to take admittance, but may deal with them as if they had been surrendered to such uses as the trustee should appoint; and his appointee is entitled to admittance (*r*).

Vesting orders.

Where a vesting order of copyholds is made with the consent of the lord, under the Trustee Act, 1850 (13 & 14 Vict. c. 60, s. 28), the lands vest accordingly without surrender or admittance; and where an order is made appointing a person to convey copyhold lands, he may surrender, and the lord is bound to admit on the surrender, as if the person in whose place the appointment is made had been free from disability and had made the surrender.

Lunatics.

The committee of a lunatic so found by inquisition can surrender the lunatic's copyholds in pursuance of an order made for the sale of the lunatic's land under the Lunacy Act, 1890 (*s*); and a lunatic entitled to admittance may be admitted by his committee, or on default by him, by an attorney appointed by the lord (*t*).

Forfeiture.

Formerly copyholds were forfeited to the lord (not to the Crown) on the attainder of the tenant of high treason or felony (*u*), but forfeiture for these causes is abolished by 33 & 34 Vict. c. 23 (*x*), and the Act appears to be applicable to copyholds.

It is a cause of forfeiture if the tenant makes a feoffment or a lease for more than one year (*y*), except under a special custom (*z*), or with licence from the lord (*a*).

(*p*) Before the Naturalization Act, 1870 (33 Vict. c. 14), the lord was not bound to admit an alien.

(*q*) *Blunt* v. *Clark*, 2 Sid. 61.

(*r*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 50 (4).

(*s*) 53 Vict. c. 5, ss. 120, 124.

(*t*) *Ib.* ss. 125, 126.

(*u*) But not on conviction only, unless there was a special custom; *R.* v. *Willes*, 3 B. & Ald. 510.

(*x*) *Post*, p. 366.

(*y*) But if the lease be for one year only with a covenant that at the expiration of the year the lessee shall have the lands for another year, and so on from year to year, it is no forfeiture: *Montague's Case*, Cro. Jac. 301; *Doe* v. *Clare*, 2 T. R. 739.

(*z*) So formerly if he levied a fine or suffered a recovery. See as to these causes of forfeiture, Co. Litt. 59*a*;

Waste.

If there be no custom to the contrary, waste, whether voluntary or permissive, works forfeiture of a copyhold (*b*). Even the destruction of a copyhold house by fire is waste, unless it is repaired within a convenient time, or the burning is by act of the God, as by lightning (*c*).

Forfeiture is also incurred by the refusal or neglect of the tenant to perform the services due in respect of his tenement (*d*), as, for instance, if he refuses to perform suit to his lord's court after sufficient warning (*e*).

Fines.

Fines are either certain or arbitrary; but an arbitrary fine must be reasonable (*f*), and two years' improved value, deducting quit rents, is the largest sum allowed to be reasonable (*g*).

Where the fine on admittance is certain, the tenant is bound to pay it immediately after admittance upon pain of forfeiture; but where it is arbitrary, refusal to pay the fine demanded, on the ground that it is larger than the custom warrants, is no forfeiture; and, even though a reasonable fine be assessed, the tenant has a reasonable time to discharge it, unless the custom fixes a certain day for payment (*h*).

Where the tenant refuses to pay a rent due by the custom, it is a forfeiture, unless he refuses on the ground that he has no money, or makes some other excuse which does not deny the lord's right (*i*).

Seizure *quousque.*

Where the heir does not tender himself for admittance within the time prescribed by the custom, proclamation is made for him to come and be admitted at the next Court. If he fails to come at that Court, further proclamations are made at the two or three following Courts, according to the custom. If he fails to appear on the last proclamation, the lord may seize the tenement into

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Taverner and Cromwell's Case, 4 Rep. 27*a*; *Doe* v. *Hellier*, 3 T. R. at p. 166. The question whether a forfeiture has been incurred in such cases would appear to be whether or not an estate passed by the act in question (Co. Litt. 59*a*, Hargr. note), so that no forfeiture would be caused by executing a charter of feoffment, without any livery of seisin: and at the present day a feoffment has no tortious operation.

(*a*) 1 Cruise Dig. 284, 309.

(*b*) Co. Litt. 63*a*.

(*c*) *Clifton* v. *Molineux*, 4 Rep. 27*a*; *Rook* v. *Worth*, 1 Ves. Sen. 462.

(*d*) *Grey* v. *Ulisses*, Latch, 122.

(*e*) *Bullevant* v. *Pickstaffe*, Roll. Rep. 429; *Hammond* v. *Wemibank*, 3 Bulst. 268. There is perhaps a question whether personal notice of the holding of the Court must be given; see the cases in 6 Vin. Ab. 129 (*Copyhold*, M. c.).

(*f*) *Willowes' Case*, 13 Rep. 1.

(*g*) *Halton* v. *Hassel*, 2 Str. 1042; *Grant* v. *Astle*, 2 Doug. 723.

(*h*) *Dalton* v. *Hamond*, Cro. El. 779; *Gardiner* v. *Norman*, Cro. Jac. 617.

(*i*) Coke, Cop. 57.

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his own hands *quousque*, *i.e.*, until the heir comes in to be admitted (*k*). In like manner the lord can seize *quousque* in the case of a devisee (*l*); or of a remainderman, where the custom requires him to be admitted on the determination of the particular estate. In the latter case the proclamations may be in general terms for any person to come and make title (*m*). The custom may even authorize seizure *quousque* in the case of a surrenderee after three proclamations; but this is extremely rare (*n*).

Forfeiture for non-admittance or failure to pay the fine on admittance is prevented in the cases of infants, married women, and lunatics, by 1 Wm. IV. c. 65 (*o*).

Heriots.

The word *Heriot* is used in three different meanings, which must be distinguished. (1) Heriot service, which arises only from freeholds in respect of the tenure (*p*). It is extinguished by the purchase of part of the land by the lord (*q*). (2) Suit Heriot, which is a heriot reserved on a lease or a grant in fee simple since the Statute of *Quia Emptores* (*r*). (3) Heriot custom, which is a heriot due by the custom of the manor on the death of a freehold (*s*) or a copyhold tenant. It is not due on the death of a person who is only equitably entitled (*t*), and in the case of joint tenants or coparceners it is due only on the death of the survivor (*u*).

Rights of common.

Copyholders are generally entitled by the custom to certain rights of common on the wastes of the manor; and they may be entitled to similar rights over the lands of a stranger. In the

(*k*) The proceedings must strictly follow the custom; *Doe* v. *Hellier*, 3 T. R. 162. There may be a custom for the lord to seize as for an absolute forfeiture on the heir not presenting himself for admittance; *Salisburie's Case*, 1 Keb. 287.

(*l*) *Roe* d. *Ashton* v. *Hutton*, 2 Wils. 162.

(*m*) *Doe* d. *Whitbread* v. *Jenney*, 5 East, 522.

(*n*) *Baspole* v. *Long*, Yelv. 1.

(*o*) As to relief from forfeiture for non-payment of a rent or other money in the case of copyholds, see *Peachey* v. *Somerset*, Ab. Eq. 227; S.C., Pre. Ch. 568. And, as to lunatics, the lord can appoint an attorney to take admittance, if the committee fail to be admitted; Lunacy Act, 1890 (53 Vict. c. 5), s. 126.

(*p*) See *Austin* v. *Bennet*, 1 Salk. 356; *Major* v. *Brandwood*, Cro. Car. 260.

(*q*) *Talbot's Case*, 8 Rep. 104*b*.

(*r*) See *Edwards* v. *Moseley*, Willes, 192.

(*s*) *Damerell* v. *Protheroe*, 10. Q. B. 20. There cannot be a good custom for the lord to have a heriot on the death of a person who is not his tenant; *Parker* v. *Combleford*, Cro. El. 725.

(*t*) *Trinity College* v. *Browne*, 1 Vern. 441.

(*u*) *Garland* v. *Jekyll*, 2 Bing. at p. 286; *Padwick* v. *Tyndall*, 1 E. & B. 191. See further as to these heriots, *Anon*, 4 Leon. 239; *Bruerton's Case*, 6 Rep. 1; *Snag* v. *Fox*, Palm. 342; *Attree* v. *Scott*, 6 East, 476.

latter case they must claim by prescription in the name of their lord (*x*).

Boundaries.

It is the duty of the copyholder to preserve the boundaries of his holding; and if he neglects to do so, the Chancery Division of the High Court will ascertain the boundaries, or, if that be impossible, will order an equivalent quantity of his land to be set out (*y*).

Copyhold Acts.

By various statutes known as the Copyhold Acts (*z*), provision has been made for the commutation of manorial rights in respect of copyhold lands, and also for the enfranchisement of such lands, *i.e.* for enabling the copyholder to acquire the freehold interest therein.

Commutation of Manorial Rights.

The Copyhold Act, 1841, provides for the appointment of "Copyhold Commissioners" and for other machinery for effecting a general commutation of rents, fines and heriots, and of the lord's rights in timber and minerals (*a*), by agreement between the lord and a majority of three-fourths in number and value of the tenants confirmed by the Copyhold Commissioners (*b*); and also for the like commutation by agreement between the lord and individual tenants (whatever their respective interests) (*c*), with the consent of the Commissioners, as to rents, fines, and heriots, and any other of the lord's rights. The consideration for such commutations is to be a rent-charge, and a fine not exceeding five shillings on death or alienation, or a fine only, or (*d*) a conveyance of land parcel of the manor or of mines or minerals under such lands or of "rights to waste in lands" belonging to the manor (*e*). The commutation is not to affect certain rights of the lord, including escheats, franchises, &c., fisheries, and mines and minerals or quarries (*f*). The effect of the commutation is not to destroy the copyhold tenure, but the land ceases to be sub-

(*x*) Elph. N. & C. Interp. 614. *Post*, ch. xiii.

(*y*) See Seton on Decrees, pp. 1031 *et seq.* This may be done even after enfranchisement; see *Searle* v. *Cooke*, 43 Ch. D. 519.

(*z*) These Acts are (1841), 4 & 5 Vict. c. 35; (1843), 6 & 7 Vict. c. 23; (1844), 7 & 8 Vict. c. 55; (1852), 15 & 16 Vict. c. 51; (1858), 21 & 22 Vict. c. 94; and (1887), 50 & 51 Vict. c. 73. (This last Act (s. 7), provides in general terms as to "any land" liable to any heriot, or to any quit rent, free rent, or other manorial incident, for the compulsory extinguishment of such rights or incidents.)

(*a*) Cop. Act, 1841, ss. 13 *et seq.*

(*b*) *Ib.* s. 23. Now the Board of Agriculture, *ante*, p. 51.

(*c*) Cop. Act, 1841, s. 52.

(*d*) 6 & 7 Vict. c. 23, s. 1.

(*e*) These provisions were afterwards extended to lands and minerals not parcel of or under the lands of the manor, 7 & 8 Vict. c. 55, s. 5.

(*f*) 4 & 5 Vict. c. 35, s. 82.

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ject to any customary mode of descent, and becomes subject to the common law as to descent, dower, and curtesy (*g*).

Enfranchisement.

Enfranchisement is a conveyance or release by the lord to his copyhold tenant of the freehold estate in the land or of the seignorial rights in respect of the land: and its effect is to extinguish the copyhold tenure and to cause the lands to be held no longer of the lord of the manor, but of the next superior lord, of whom the lord of the manor held (*h*).

At Common Law.

Statutory.

Enfranchisement may be either at common law, by agreement between lord and tenant (*i*), or statutory, *i.e.*, under the Copyhold Acts. At common law it can be effectual only to the extent of the freehold estate belonging to the lord; so that if he has only a limited interest, *e.g.* an estate for life, the enfranchisement is not complete. Statutory enfranchisement may be effected (1) by deed (*k*) under a voluntary agreement between lord and tenant; or (2) compulsorily, by means of an award of the Board of Agriculture as representing the commissioners constituted by the Copyhold Act, 1841 (*l*).

(1) Voluntary enfranchisement is to be effected by agreement between the lord and tenant with the consent of the commissioners, followed by a conveyance with the consent of the commissioners, and is then effectual, whatever be the respective estates or interests of the lord and tenant (*m*). Provision is made for the giving of notices to persons entitled to the next estates of inheritance in remainder or reversion (*n*), and for the case of persons under disability (*o*).

The lands enfranchised are to be deemed to be held under the same title as before the enfranchisement (*p*). Upon enfranchisement the lands are to become and be in all respects of freehold tenure, mortgages on the copyhold interest are to attach on the freehold (subject to the payment of the consideration for enfranchisement), and commonable rights are preserved (*q*).

(*g*) *Ib.* s. 79.

(*h*) *Bradshaw* v. *Lawson*, 4 T. R. 443.

(*i*) See a form of agreement in 1 K. & E. 360.

(*k*) The 11th section of the Copyhold Act, 1852, directs all enfranchisements (apparently whether voluntary or compulsory) to be made by deed. This section is repealed by the Act of 1858, 21 & 22 Vict. c. 94, s. 2. By the same Act, s. 10, it is provided that compulsory enfranchisements are to be made by the award of the Commissioners.

(*l*) 4 & 5 Vict. c. 35, s. 2.

(*m*) *Ib.* ss. 56, 57.

(*n*) *Ib.* s. 56. See Cop. Act, 1843, s. 13.

(*o*) Cop. Act, 1841, ss. 11, 56.

(*p*) Cop. Act, 1841, s. 64. See also Cop. Act, 1841, s. 56; Cop. Act, 1843, ss. 1, 2, 3; Cop. Act, 1844, s. 5, under which the consideration may be the conveyance of other lands.

(*q*) *Ib.* s. 81; and see Cop. Act, 1852,

(2) Compulsory enfranchisement is provided for by the Copyhold Acts, 1852, 1858, and 1887, and may be effected by means of a deed or by an award of the commissioners (Board of Agriculture) without conveyance. Either the lord or the tenant may require and compel enfranchisement (*r*). The party requiring the enfranchisement is to give notice to the other party of his desire, and the consideration or compensation to be paid to the lord is, unless the parties agree, to be ascertained by valuation (*s*). The Copyhold Act, 1887 (*t*), contains provisions as to the method of valuation, and provides that the consideration for the enfranchisement may in any case be a gross sum of money; but, unless the parties otherwise agree, where the enfranchisement is effected at the instance of the lord, or where the land can be sufficiently identified and the compensation payable to the lord exceeds one year's improved annual value of the land, it is to be an annual rentcharge equivalent to £4 per cent. per annum upon the amount of compensation (*u*). The Copyhold Act, 1887, also provides for a scale of compensation to be framed under it (*x*), and for payment to the steward of the compensation mentioned in the schedule to the Act (*y*). When the consideration has been arrived at (whether by agreement or valuation), the commissioners (Board of Agriculture) may frame an award which, when confirmed, has the effect of a conveyance (*z*). The effect of enfranchisement is that the lands become of freehold tenure, and subject to the common law as to descent, dower and curtesy (*a*). The enfranchisement is not to affect rights in respect of leases, or commonable rights, or rights under wills, settlements, mortgages, or otherwise (*b*), nor rights of lord or tenant in respect of mines and minerals (*c*). By the Copyhold Act, 1887 (*d*), the lord's rights in case of escheat for want of heirs are preserved. Provision has

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s. 34. By the Cop. Act, 1843, s. 10, rights as against lessees are preserved, and by the Cop. Act, 1852, s. 44, the freehold into which the copyhold estate is converted is to be the reversion to which the rents and services under leases are to be annexed.

(*r*) Cop. Act, 1852, s. 1.

(*s*) Cop. Act, 1887, s. 3.

(*t*) 50 & 51 Vict. c. 73, ss. 3, 43.

(*u*) Cop. Act, 1887, ss. 13, 14. The rentcharge is redeemable (see s. 17). As to the remedies for recovery of such a rentcharge, see *Searle* v. *Cooke*, 43 Ch. D. 519.

(*x*) *Ib.* s. 30.

(*y*) *Ib.* s. 27. See Cop. Act, 1852, s. 19, as to the steward.

(*z*) Cop. Act, 1858, s. 10; Cop. Act, 1887, s. 22.

(*a*) Cop. Act, 1852, s. 34.

(*b*) Cop. Act, 1852, ss. 44, 45, 46.

(*c*) *Ib.* s. 48.

(*d*) 50 & 51 Vict. c. 73, s. 4.

been made by various statutes for the enfranchisement of copyholds held of ecclesiastical corporations (*e*).

The Settled Land Act, 1882, gives powers of enfranchisement to tenants for life and others (*f*).

By the Copyhold Act, 1887 (*g*), the steward of the manor is bound to give notice to any tenant on his admittance that he is entitled to enfranchisement on paying the lord's compensation and the steward's fees. The Act also provides that anything by the Copyhold Acts required or authorised to be done by the lord or the tenant may be done by him where he is a trustee or has only a limited estate, and on behalf of infants or lunatics by their guardians or committees; and a married woman is for purposes of the Acts to be deemed to be a *feme sole* (*h*).

(*e*) See 21 & 22 Vict. c. 94, ss. 4, 5; and 14 & 15 Vict. c. 104; 17 & 18 Vict. c. 116.

(*f*) 45 & 46 Vict. c. 38, ss. 3 (ii.), 4 (1) and (7), 5, 18, 20 (1). See form in 1 K. & E. 554.

(*g*) 50 & 51 Vict. c. 73, s. 1.

(*h*) *Ib.* s. 39.

CHAPTER XIII.

INCORPOREAL HEREDITAMENTS (*a*).

I. Incorporeal hereditaments —what.

REFERENCE has already been made to the division of hereditaments into Corporeal and Incorporeal (*b*). The following explanation of the latter is given by Blackstone (*c*) :—

"An Incorporeal hereditament is a right issuing out of a thing corporate (whether real or personal) or concerning, or annexed to, or exercisable within, the same. It is not the thing corporate itself, which may consist in lands, houses, jewels, or the like, but something collateral thereto, as a rent issuing out of those lands or houses, or an office relating to those jewels. In short, as the logicians speak, corporeal hereditaments are the substance which may be always seen, always handled: incorporeal hereditaments are but a sort of accidents which inhere in and are supported by that substance, and may belong or not belong to it without any visible alteration therein. Their existence is merely in idea and abstracted contemplation, though their effects and profits may be frequently objects of our bodily senses. And, indeed, if we would fix a clear notion of an incorporeal hereditament, we must be careful not to confound together the profits produced and the thing or hereditament which produces them. An annuity, for instance, is an incorporeal hereditament; for though the money, which is the fruit or product of this annuity, is doubtless of a corporeal nature, yet the annuity itself which produces that money is a thing invisible, has only a mental existence, and cannot be delivered over from hand to hand. So tithes, if we consider the produce of them, as the tenth sheaf, or tenth lamb, seem to be completely corporeal: yet they are indeed incorporeal hereditaments; for, they being merely a contingent right, collateral to or issuing out of lands, can never be the object of sense; they are neither capable of being shown to the eye nor of being delivered into bodily possession (*d*)."

The term "incorporeal hereditament" is also often applied to reversions and remainders, as distinct from estates in possession,

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(*a*) Challis, R. P. 39.

(*b*) As to this division and the objections to it, see *ante*, p. 12, and notes.

(*c*) Vol. ii. 20.

(*d*) Therefore they are said to "lie in grant and not in livery" (of seisin); see *ante*, p. 12, note (*q*). A freehold interest in them cannot be created except by deed. But "an agreement for valuable consideration, though not under seal, is sufficient to create a right to an easement, and, for the purpose of creating a lawful user, is as good as a deed"; per Lindley, J., *Dalton* v. *Angus*, 6 App. Cas. at p. 765; *Ibid.* p. 782, per Bowen, J., as to these "equitable rights in the nature of easements," and Gale on Easements, 58.

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in corporeal hereditaments (*e*); and the hereditaments of which we are about to treat are styled, by way of distinction, "purely incorporeal" (*f*).

The principal kinds of incorporeal hereditaments are:—

(1) Profits *à prendre;* (2) easements (*g*); (3) advowsons; (4) tithes; (5) offices; (6) dignities; (7) franchises; (8) annuities; (9) rents (*h*).

Incorporeal hereditaments may be (1) appendant to corporeal hereditaments; (2) appurtenant to corporeal hereditaments; (3) in gross, *i.e.*, existing as separate subjects of property (*i*). In order to understand the distinction between appendant and appurtenant it is necessary to consider the meaning of prescription.

Prescription—

The common law recognises the principle that the right to an incorporeal hereditament may be proved by a person showing that he and those through whom he claims have immemorially enjoyed it. This method of proving the right is called prescription (*k*).

—supposes a grant before legal memory.

It supposes that a grant of the right was made before the commencement of legal memory, *i.e.*, the first day of the reign of Richard I. (3rd Sept., 1189), and that the grant has been lost (*l*). Owing to the difficulty of carrying back the proof during so long a period, the Courts adopted the rule that the uninterrupted enjoyment of an incorporeal hereditament for the period of forty, or even twenty years, according to the circumstances, raised a presumption that it had been enjoyed continuously since a time before the commencement of legal memory. This presumption can be rebutted by showing that the right had its origin since that time (*m*). To meet cases in which a presumption of immemorial user was liable to be rebutted by proof that the usage arose since the beginning of the reign of Richard I., it became the practice to allege that a grant had been made at a time within the period of legal memory, and that such grant had been lost (*m*). In support

Lost grant within legal memory.

(*e*) See this explained, Elph. Introd. 15.

(*f*) Wms. R. P. 374 *et seq.*

(*g*) As to whether easements are hereditaments, see *ante*, p. 13, in note (*q*).

(*h*) See another classification, 2 Bl. 21.

(*i*) See Wms. on Real Prop. p. 74.

(*k*) See 3 Cruise, Dig. 420; Shelford, Real. P. Stat. pp. 28 *et seq.*; Williams on Commons, Lecture i. Gale on Easements, ch. iv. The reader is referred especially to the elaborate discussion of the Law of Prescription in the case of *Angus* v. *Dalton*, 3 Q. B. D. 85 (see pp. 90, 103–4); S. C., 4 Q. B. D. 162; sub nom. *Dalton* v. *Angus*, 6 App. Cas. 740 (see per Lord Blackburn, at p. 818).

(*l*) See Stephen, Dig. Evid. p. 109, Art. 100.

(*m*) *Angus* v. *Dalton*, 3 Q. B. D. at p. 105; *Bass* v. *Gregory*, 25 Q. B. D. 481, 484.

of such an allegation it was necessary to give some evidence to show that the usage probably arose about the time at which the grant was alleged to have been made (*n*). The allegation of a lost grant might, however, be defeated by showing that no such grant could have been lawfully made (*o*), or that the enjoyment was by sufferance (*p*).

In *Angus* v. *Dalton* (*q*), Cockburn, C.J., observed that at the common law there appears to have existed no fixed period of prescription, but that the judges proceeded to apply to incorporeal hereditaments the rule as to the period of limitation in a writ of right for the recovery of land (*r*) laid down by the Statute of Westminster 1st (3 Edw. I. c. 39), viz., the first year of the reign of King Richard I. But, he says (*s*):—

"The statute of 21 Jac. I. c. 16, which limited the time for bringing a possessory action to twenty years, led soon afterwards to a very important change in the law by the arbitrary adoption of that period by the courts as sufficient to found the presumption of the existence of a right from the time of legal memory (*t*). But it is to be observed that, with all their desire to reduce the period of prescription within reasonable limits, the Courts never gave greater effect to length of enjoyment than that of affording a presumption of prescriptive right, capable of being rebutted by proof of an origin at a time later than that of legal memory. Hence, if in the course of a cause it appeared that the disputed right had a later origin, the presumption failed and the claim of right was defeated.

Fiction of lost grant.

"The frequency of this result gave rise to a new device. As, independently of prescription, every incorporeal hereditament must have had its origin in grant, the fiction was resorted to of presuming, after long user, a grant by a deed which in the lapse of time had been lost. At first, to raise this presumption it was required that the user should be carried back as far living memory would go; but after the statute of James, user for twenty years was—here again without any legislative authority, and by the arbitrary ruling of the judges—held to be sufficient to raise this presumption of a lost grant, and juries were directed so to find in cases in which no one had the faintest belief that any grant had ever existed, and where the presumption was known to be a mere fiction. . . . . Thus the law remained till the Act of 2 & 3 Wm. 4, c. 71, was passed with the view of putting an end to the scandal on

(*n*) *Blewett* v. *Tregonning*, 3 A. & E. 554.

(*o*) *Mill* v. *Commissioner of New Forest*, 18 C. B. 60; *Angus* v. *Dalton*, 4 Q. B. D. at pp. 174, 175, per Thesiger, L.J.; *ib.* 186, per Cotton, L.J.

(*p*) See *Angus* v. *Dalton*, 3 Q. B. D. 85, 93.

(*q*) 3 Q. B. D. 85, at p. 103, *et seq.*

(*r*) See *post*, ch. xvi., p. 408.

(*s*) 3 Q. B. D. 105: see the remarks of Thesiger, L.J., in S. C. 4 Q. B. D., at p. 170.

(*t*) See the remarks of Bowen, J., in *Dalton* v. *Angus*, 6 App. Cas. at p. 781.

the administration of justice, which arose from thus forcing the consciences of juries. . . . . But this doctrine of presumption from user or enjoyment under the former law could not, according to the highest authorities, be carried, as regarded the presumption of a lost grant, any more than that which had reference to the existence of an easement beyond time of legal memory, further than that of a presumption capable of being rebutted and so destroyed (*u*)."

Prescription Act, 2 & 3 Wm. IV. c. 71.

In this state of things, the Prescription Act, 2 & 3 Wm. IV. c. 71 (*x*), intituled an Act for shortening the Time of Prescription in certain Cases, was passed (*y*). The preamble to the Act is as follows:—

> "Whereas the expression 'time immemorial, or time whereof the memory of man runneth not to the contrary,' is now by the law of England in many cases considered to include and denote the whole period of time from the reign of King Richard the First, whereby the title to matters that have been long enjoyed is sometimes defeated by showing the commencement of such enjoyment, which is in many cases productive of inconvenience and injustice; for remedy thereof be it enacted, &c."

The main provisions of the Act have been thus summarised (*z*):—

Profits *à prendre*.

S. 1. "Claims to rights of common and other profits *à prendre* (except tithes, rent, and services) are not to be defeated after thirty years' uninterrupted enjoyment by showing that such right was first enjoyed at any time prior to such period of thirty years; but such claim may be defeated in any other way by which it is now liable to be defeated; and when such right has been enjoyed as aforesaid for sixty years, it shall be indefeasible, unless had by consent or agreement.

Easement.

S. 2. "A similar provision as to rights of way or water, or other easement, except that the periods are twenty and forty years respectively.

Light.

S. 3. "Right to light is to be indefeasible after enjoyment, without interruption (*a*), for twenty years unless it has been enjoyed by consent in writing.

(*u*) The reference here is to the *presumption* of immemorial enjoyment from a long period of modern user; but where immemorial enjoyment is proved there is an irresistible inference: see *per* Bowen, J., *Dalton* v. *Angus*, 6 App. Cas. at pp. 783, 784.

(*x*) The Act relates (s. 1) to claims "which may be lawfully made at the common law by custom, prescription, or grant," to "any right of common or other profit, or benefit," and (s. 2) to "any way or other easement, or to any water-course, or the use of any water." See the Act, with notes, in Shelford, R. P. Statutes.

(*y*) It applies only to rights which are in some way appurtenant to a dominant tenement, not to rights claimed in gross: *Shuttleworth* v. *Le Fleming*, 19 C. B. N. S. 687.

(*z*) Marcy's Conveyancing Statutes.

(*a*) As to the meaning of these words, and that they are not equivalent to "without cessation," see *Hollins* v. *Verney*, 13 Q. B. D. 304, at p. 307.

S. 4. "The said periods are to be deemed those next before suit or action commenced questioning the right. No act to be deemed an 'interruption' unless acquiesced in for one year after notice" (*b*).

It appears to be necessary to prove enjoyment within a year before action brought in order to satisfy the 4th section of the statute (*c*); and inability to do this sometimes renders it necessary to rely upon prescription at common law or upon the presumption of a lost grant. It should be added, that it is provided in the 6th section of the Act—

Application of Act.

S. 6. "That in the several cases mentioned in and provided for by this Act, no presumption shall be allowed or made in favour or support of any claim, upon proof of the exercise or enjoyment of the right or matter claimed for any less period of time or number of years than for such period or number mentioned in this Act as may be applicable to the case and to the nature of the claim."

The meaning of this section seems to be "that no presumption or inference in support of the claim shall be derived from the bare fact of user or enjoyment for less than the prescribed number of years; but, when there are other circumstances in addition, the statute does not take away from the fact of enjoyment for a shorter period its natural weight as evidence, so as to preclude a jury from taking it, along with other circumstances, into consideration as evidence of a grant" (*d*). The owner of the dominant tenement may still prove his right over the servient tenement as before; where the statute is not needed, the title can be rested on the original right before the passing of the statute (*e*).

Effect of Act.

The statute has not altered the nature of the right, or the principle upon which it is to be determined whether the right has been infringed; but has merely substituted a statutory title for the fiction of a lost grant (*f*). Thus, as regards the right to light and air, it was contended in *Kelk* v. *Pearson* (*g*) that enjoyment of free light and air for more than twenty years, gave under the statute an absolute and indefeasible right to the whole amount

(*b*) See *Bewley* v. *Atkinson*, 13 Ch. D. 283; *Hollins* v. *Verney*, 13 Q. B. D. 304.

(*c*) *Parker* v. *Mitchell*, 11 A. & E. 788.

(*d*) *Per* Westbury, C., in *Hanmer* v. *Chance*, 34 L. J. Ch. 413.

(*e*) *Per* Hatherley, L.C., in *Warrick* v. *Queen's College*, L. R. 6 Ch. 728.

(*f*) *Per* Lord Selborne, *City of London Brewery Co.* v. *Tennant*, L. R. 9 Ch. P. 219.

(*g*) L. R. 6 Ch. 809. The amount of obstruction is a question of fact in each case, *Parker* v. *First Avenue Hotel Co.*, 24 Ch. D. 282.

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"I am of opinion that the statute has in no degree whatever altered the pre-existing law as to the nature and extent of this right. The nature and extent of the right before that statute was to have that amount of light through the windows of a house which was sufficient, according to the ordinary notions of mankind, for the comfortable use and enjoyment of that house as a dwelling-house, if it were a dwelling-house, or for the beneficial use and occupation of the house, if it were a warehouse, a shop, or other place of business. That was the extent of the easement—a right to prevent your neighbour from building upon his land so as to obstruct the access of sufficient light and air to such an extent as to render the house substantially less comfortable and enjoyable.

"Since the statute, as before the statute, it resolves itself simply into the same question, a question of degree."

Claim by custom.

The right to an incorporeal hereditament may in some cases be claimed by custom, *i.e.*, under the law which has prevailed from time immemorial in a particular place (*h*).

The distinction between prescription and custom is thus stated by Coke: "Prescription, which is personal, is for the most part applied to persons, being made in the name of a certain person and of his ancestors, or of those whose estate he hath; or in bodies politic or corporate, and their predecessors; but a custom, which is local, is alleged in no person, but laid within some manor or other place" (*i*).

Profits à prendre, easements, and licences.

Profits *à prendre*, easements, and licences must be distinguished.

A profit *à prendre* is a right which may be either appendant or appurtenant to a corporeal hereditament, or held in gross, to go on the land of another person and to take some profit from it, as to destroy game and keep it (*k*), to pasture cattle, or to dig and carry away minerals.

Easements.

An easement has been defined (*l*) to be a privilege without profit, which the owner of one tenement, which is called the dominant tenement, has over another, which is called the servient

(*h*) But, except in the case of copyholds, *ante*, p. 320, a *profit à prendre* cannot be claimed by custom; see Wms. on Commons, 194.

(*i*) Co. Litt. 113*b*, quoted in notes to *Tyrringham's Case*, Tudor, L. C. R. P. 137; Elph. Introd. 97.

(*k*) *Hooper* v. *Clark*, L. R. 2 Q. B. 200; *Webber* v. *Lee*, 9 Q. B. D. 315.

(*l*) Termes de la Ley, s. v. *Easement*, cited 5 B. & C. 229, *per* Bayley, J., as "a book of great antiquity and accuracy." Notes to *Sury* v. *Pigot*, Tudor, L. C. R. P. 167; Elph. Introd. 96; Elph. N. & C. Interp. 164 *et seq.*

tenement, to compel the owner thereof to permit to be done, or to refrain from doing, something on such tenement for the advantage of the former. Thus, if the owner of estate A. has a right of way over estate B., he can compel the owner of estate B. to permit him to go along the way. So, if the owner of estate A. has ancient lights in a house on his estate, he can prevent the owner of estate B. from doing any act on his own land which will deprive him of his accustomed portion of light and air.

The former kind of easement is termed Affirmative; the latter, Negative.

Licence.

On the other hand, a licence is a mere personal liberty granted to a man to do something on the land of another (*m*). A mere licence is in its nature revocable at the pleasure of the licensor; but, if it comprises or is connected with a grant, the party who has given it cannot in general revoke it so as to defeat his grant to which it was incident (*n*). A licence differs from an easement inasmuch as it is not annexed in enjoyment to land. A mere licence differs from a profit *à prendre* inasmuch as it does not enable the licensee to take any profit; and a licence differs from both easements and profits *à prendre* as it is not a hereditament. The distinction between a licence and a profit *à prendre* is discussed in *Wickham* v. *Hawker* (*o*). The word "licence" is sometimes used to denote a profit *à prendre*, and in this case it is sometimes called a "licence of profit"; for example, a mining lease effected by a grant of liberty to take the minerals, without any demise of the land.

Express grant of easement.

Where an easement or profit *à prendre* is created by express grant, a deed (but no special form of words (*p*)) is necessary; but no deed is necessary to create a licence (*q*); and an equitable right to an easement or profit *à prendre* may be created for value without deed (*r*).

Statute of Uses.

We have seen that by the Statute of Uses real estate (except copyholds), whether corporeal or incorporeal, may be conveyed

(*m*) *E.g.*, to put pleasure-boats on a canal; *Hill* v. *Tupper*, 2 H. & C. 121.

(*n*) *Per* Alderson, B., *Wood* v. *Leadbitter*, 13 M. & W. 838.

(*o*) 7 M. & W. 78.

(*p*) Elph. N. & C. Interp. 184.

(*q*) *Hewlins* v. *Shippam*, 5 B. & C. 221; *Cocker* v. *Cowper*, 1 C. M. & R. 418; *Rex* v. *Horndon on the Hill*, 4 M. & S. 562; *Wood* v. *Leadbitter*, 13 M. & W. 838; *Adams* v. *Andrews*, 15 Q. B. 284.

(*r*) *Devonshire* v. *Eglin*, 14 Beav. 530; *Dalton* v. *Angus*, 6 App. Cas. at p. 765; *Ibid.*, p. 782; *ante*, p. 325, note (*d*).

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to uses. It is however said (*s*), that the property must be *in esse* at the time of the creation of the use. Therefore, if A. covenant to stand seised of lands, which he shall afterwards purchase, to certain uses, no use can arise by virtue of such covenant upon lands of which he may afterwards become the purchaser. So, if A. convey his lands by bargain and sale enrolled to J. S. in fee, with a way over other lands belonging to A., the right of way does not pass; because it is not *in esse* at the time of the bargain and sale, in other words because there is no previously existing seisin of the right of way out of which the use can arise. On the other hand, if it was an existing right of way (over the land of a stranger) appurtenant to the lands bargained and sold, it would pass together with the lands (*t*). And so it is said (*u*):—

"Neither can things which are mere rights be conveyed by way of use, as commons, &c., ways in gross, for a man cannot walk over ground to the use of a third person."

This is further explained by the words of the Statute of Uses (*x*), being "of and in such like estates" (*y*), so that estates only could be raised by way of use, and the statute did not apply to the creation of other new interests (*z*), though, when once created for a freehold interest, they could, as hereditaments, be conveyed to uses (*a*). This inconvenience, which arose under conveyances to uses and under powers of sale and exchange, has been removed for the future by the Conveyancing and Law of Property Act, 1881 (*b*), which, in reference to conveyances made after 1881, enacts that "a conveyance of freehold land to the use that any person may have, for an estate or interest not exceeding in duration the estate conveyed in the land, any easement, right, liberty, or privilege, in, or over, or with respect to that land, or any part thereof, shall operate to vest in possession in that person that easement," &c., "for the estate or interest expressed to be limited to him."

Conveyancing Act, 1881.

Right of support to land.

An easement must not be confounded with the ordinary rights of enjoyment by a man of his own property; for instance, the owner of land in its natural state has, as incident to his property

(*s*) Sanders on Uses, vol. i. p. 105.

(*t*) Elph. N. & C. Interp. 186.

(*u*) In Bacon's Abridgment, tit. Uses, (F).

(*x*) 27 Hen. VIII. c. 10, s. 1.

(*y*) See *ante*, p. 267.

(*z*) Except rent-charges, provided for by s. 5.

(*a*) *Dayrell* v. *Hoare*, 12 Ad. & El. 356; *Beaudeley* v. *Brook*, Cro. Jac. 189.

(*b*) 44 & 45 Vict. c. 41, s. 62.

in the land, a right to support from the neighbouring land. This right is not an easement (c). On the other hand, a man who erects a building at the extremity of his land, so as to cause a greater lateral thrust against his neighbour's land, will, after twenty years' uninterrupted enjoyment, gain a right to support for the building, and this right is an easement (d).

—to buildings.

Where the right to the enjoyment of one hereditament is annexed to the enjoyment of another, the former is said to be appendant or appurtenant to the latter. But it is not every hereditament that can be made appendant or appurtenant to another. Coke says (e):—

"Appendant" —"Appurtenant."

"Prescription does not make a thing appendant or appurtenant, unless the thing which shall be appendant or appurtenant agrees in quality or nature to the thing to which it shall be appendant or appurtenant; as a thing corporeal cannot be appendant to a thing corporeal, nor a thing incorporeal to a thing incorporeal. But a thing incorporeal, which lies in grant as an advowson, may be appendant to a thing corporeal, as to a manor, or a thing corporate, as land to a thing incorporate, as an office; but they must agree in nature and quality, for a common of turbary or estovers cannot be appendant or appurtenant to land, but to a house, to be spent there. So, a leet which is temporal cannot be appendant to a church or chapel, which is ecclesiastical."

"Appendant" and "appurtenant" are often, particularly in the older reports, confounded (f). The distinction appears to be that one hereditament is appendant to another where it became annexed in enjoyment to it by operation of law before the time of the commencement of legal memory. On the other hand, a thing may become appurtenant by express grant, even at the present day.

From the nature of appendancy it is obvious that it is not every incorporeal hereditament that can be appendant. Probably the only incorporeal hereditaments that can be appendant are commons and advowsons (g).

Where a right is claimed as appendant or appurtenant to lands, the person claiming it alleges that he and all those whose estate

Prescription in a *que estate*.

(c) *Backhouse* v. *Bonomi*, 9 H. L. C. 503; *Rigby* v. *Bennett*, 21 Ch. D. 559.

(d) *Dalton* v. *Angus*, 6 App. Cas. 470; *Lemaitre* v. *Davis*, 19 Ch. D. 281; *Tone* v. *Preston*, 24 Ch. D. 739.

(e) Co. Litt. 121*b*.

(f) The passage from Co. Litt. just cited will be found in *Tyrringham's Case*, 4 Rep. 36*b*, with the omission of the word "appurtenant" all through

(g) It is sometimes said that the seignory of the freehold lands held of a manor is appendant to the manor; but it appears to be more correct to say that it is parcel of the manor.

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he has (*que estate il ad*) in the lands have enjoyed it. This is called "prescribing in a *que estate*" (*h*).

— in a man and his ancestors.

Where the right is not claimed as appendant or appurtenant to lands, the allegation is that the person claiming and his ancestors have enjoyed it; and such a right is said to be "in gross" (*i*).

Extinguishment.

Profits *à prendre* and easements may be extinguished by express release, or by unity of seisin or ownership of the dominant and servient tenements (*k*), or by abandonment. In order to establish abandonment, it is not necessary to show any definite period of non-user: the period of time is only material as one element from which the grantee's intention to release or abandon his easement may be inferred against him; what period may be sufficient in any particular case must depend on all the accompanying circumstances. It is not so much the duration of the cesser as the nature of the act done by the grantee of the easement, or of the adverse act acquiesced in by him, and the intention in him which either the one or the other indicates, which are material (*l*).

General words.

Easements and profits *à prendre* which are appendant or appurtenant to the land in respect of which they are exercised, pass by a conveyance of the land simply (*m*); but if such rights, though reputed to belong to or usually enjoyed with the lands, were not strictly appendant or appurtenant to them, they did not in conveyances, before 1882, pass by the conveyance of the land, though expressed to be with the appurtenances. In order that they might pass, there must have been an express or a general description of them, and hence the insertion of what are called "general words" (*n*) after the parcels in a conveyance, so as to include reputed rights and easements (*o*).

(*h*) Williams on Commons, Lect. ii., p. 16.

(*i*) 2 Bl. 265; Williams on Commons, 9.

(*k*) As to the re-creation of rights thus extinguished or suspended, see *James* v. *Plant*, 4 Ad. & Ell. 749; and *Kay* v. *Oxley*, L. R. 10 Q. B. 360.

(*l*) *Per* Lord Denman, C.J., in *Queen* v. *Chorley*, 12 Q. B. 519; and see *per* Lord Chelmsford, L.C., in *Crossley* v. *Lightowler*, L. R. 2 Ch. 482. See further, on extinguishment, the notes to *Tyrringham's Case* and to *Sury* v. *Pigot*, in Tudor, L. C. R. P. See, however, *per* Lord Selborne, in *Neill* v. *D. of Devonshire*, 8 App. Cas. 135, at p. 154, that "abandonment is a term which has no legal meaning as to an incorporeal hereditament which can only pass by deed." And in all the cases which are sometimes referred to as deciding that such a right can be abandoned (see *e.g.*, Hall on *Prof. à Prendre*, 339), there seems to have been an actual exclusion of or adverse enjoyment against the person entitled to the right and not a mere non-user by him.

(*m*) 1 Da. 91; Elph. N. & C. Interp. 186.

(*n*) Elph. Introd. 96.

(*o*) Forms will be found in the books,

Conveyancing Act, 1881.

In conveyances made after 1881, by virtue of the Conveyancing and Law of Property Act, 1881 (*p*), if and as far as a contrary intention is not expressed in the conveyance, "general words" are implied in the conveyance operating to pass all "liberties, privileges, easements, rights, and advantages whatsoever, appertaining or reputed to appertain" to the property conveyed, "or *at the time of conveyance* demised, occupied or enjoyed with, or reputed or known as part or parcel of, or appurtenant to," the property conveyed. The Act gives a general description of the rights to be included by implication in a conveyance—(1) of land; (2) of land having houses or other buildings thereon; and (3) of a manor.

Profits *à prendre.*

The principal profits *à prendre* are:—(1) common of pasture; (2) common of turbary; (3) fisheries; (4) mining rights.

Common, rights of.

A right of Common (*q*) may be defined as a right which one person has of taking some part of the produce of land, while the whole property of the land itself is vested in another. Commons may be divided into four kinds—namely: I. Common of Pasture (*r*), or the right of feeding beasts upon the land of another; II. Common of Piscary (*s*), or the right of fishing in the waters of another; III. Common of Estovers (*t*), or the right of cutting wood, gorse, or furze and such like, on the land of another; IV. Common of Turbary (*u*), or the right of digging turves on the soil of another; to which, perhaps, may be added the similar right of getting sand, clay, stone, and even coals and other minerals on another's land.

Common of pasture (*x*) may be appendant, appurtenant, or in gross.

Common appendant.

The beginning of "common appendant" by the ancient law is explained in *Tyrringham's Case* (*y*) as follows:—

"When a lord enfeoffed another of arable land, to hold of him in socage, *i.e.*, *per servicium socæ* as every such tenure at the beginning (as

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specially adapted to different kinds of property. A recent instance of the effect of these words is to be found in *Kay* v. *Oxley*, L. R. 10 Q. B. 360; and see *Bayley* v. *Great Western Rail. Co.*, 26 Ch. D. 434. As to what will pass by the several technical words of description, see 1 Da. 88 *et seq.*, and 2 Da. ii. 768.

(*p*) 44 & 45 Vict. c. 41, s. 6.

(*q*) Tud. L. C. R. P. p. 127, notes to *Tyrringham's Case.*

(*r*) Elph. N. & C. Interp. 607.

(*s*) *Ib.* 576.

(*t*) Williams on Commons, 186.

(*u*) Elph. N. & C. Interp. 627.

(*x*) Elph. N. & C. Interp. 608, where the cases are collected. *Q.v.* for "stinted" common and common "of shack," Williams on Rights of Common; 3 Cruise, Dig. 65.

(*y*) 4 Rep. at 37*a*; S. C., Tud. L. C. R. P. 120. See also Wms. R. P. Ap-

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Littleton saith) was, that the feoffee *ad manutenendum servicium socæ*, should have common in the lord's wastes for his necessary cattle which ploughed and manured his land, and that for two reasons:—1st. Because it was, as it was then held, *tacitè* implied in the feoffment; for the feoffee could not plough and manure his land without cattle, and they could not be kept without pasture, *et per consequens* the feoffee should have (as a thing necessary and incident) common in the lord's wastes and land, and that appears by the ancient books, and by the rehearsal of the Statute of Merton [20 Hen. III.], c. 4. The second reason was for the maintenance and advancement of tillage, which is much respected and favoured in law, so that such common appendant is of common right, and commences by operation of law, and in favour of tillage, and therefore it is not necessary to prescribe therein, as it would be if it was against common right; but it is only appendant to ancient land, arable, hide, and gain (*z*), and only for cattle, *sc.*, horses and oxen to plough his land, and cows and sheep to manure his land, and all for the bettering and advancement of tillage, and therefore it is against the nature of a common appendant to be appendant to meadow or pasture."

Common appurtenant.

Common appurtenant does not, like common appendant, owe its origin to common right, or to a general privilege supposed to have been conferred by lords upon tenants to whom they granted arable land; but it may commence at the present day, and may be claimed under an express grant from the owner of the land, or by prescription (*a*).

Common in gross.

Common in gross is claimed under a grant to a man and his heirs, or by prescription of enjoyment, unconnected with the ownership of land, by a man and his ancestors.

Common appendant can only be enjoyed in respect of land which, at the date when the common became appendant, was arable. It is restricted to commonable beasts, *i.e.*, horses, oxen, cows, and sheep; and is limited by levancy and couchancy (*b*). Common appurtenant or in gross is not subject to any of these restrictions.

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pendix C., and authorities there cited. The translation of the passage in *Tyrringham's Case* appears not to be quite accurate. The original runs: "Quant un seignior eufeoffe auter de arrable terre a tener de luy en socage, *id est*, per servicium socæ, come chescun tiel tenure al commencement (come Littel' dit) fuit, le feffe *ad manutenendum servicium socæ* avera common en les wastes le Sñr," &c. The reference seems to be to Littleton, s. 118, where it is said that "every tenure which is not tenure in chivalrie is a tenure in socage."

(*z*) Arable land "anciently is called *hyde and gaine*"; Co. Litt. 85 b. "*Gaigner*" signifies to till: Wms. R. P. Append C. 590.

(*a*) As to common appurtenant, see Wms. on Commons, Lect. xii., p. 168.

(*b*) Levancy and couchancy means the capability of the commonable tenement to maintain during the winter by its summer produce the cattle claimed to be depastured; see *Robertson* v. *Hartopp*, 43 Ch. D. 484, at p. 516. Where the number of cattle is limited by levancy and couchancy, it is sometimes said to be "common *sans nombre*;" see *Bennett* v. *Reeve*, Willes, 227.

Inhabitants, &c., cannot prescribe.

No right can be claimed by prescription to a profit *à prendre* on behalf of a shifting body, like the inhabitants of a town or residents of a particular district (*c*). The reason is that such a body cannot prescribe for a right in gross, for, not being a corporation, they are not capable of taking by a grant, and prescription presupposes a grant; nor can they prescribe in a *que estate*, for they have no permanent estate but are mere tenants at will (*d*); and the right is annexed to the fee simple estate only (*e*). An occupier, however, can exercise the right as claiming under the tenant in fee, and occupiers may properly be parties to an action brought to assert the right. A claim was recently made by "owners and occupiers" of lands within a forest, to common of pasture over the waste of the forest (*f*). It was urged that the claim could not be sustained on behalf of the occupiers, for it was to a profit *à prendre in alieno solo*, which cannot be vested in a body of occupiers by prescription or otherwise. James, L.J., after stating the rule of law as above, said:—

"Construing the allegations here according to their plain meaning, it appears to me that if they were judged most strictly, the allegation here is of a right of common in the owners and occupiers of lands in respect of those lands; for it is in express terms claimed as a right of common, either appendant or appurtenant, for their cattle, levant and couchant, upon the tenements. That is an allegation of a right of common not unknown to the law—a right of common which is alleged as being appurtenant to land, and of course claimed by persons who are either owners or occupiers of the land in respect of which that easement (*g*) is claimed. It appears to me that the occupiers have a right to join, and to be joined, in any suit in this Court for that purpose. The occupier alone is entitled during the continuance of his occupancy; he may be an occupier for a long term of years, and he may be the only person substantially interested in the assertion of the right. Therefore, I cannot conceive that there is any objection to joining owners and occupiers in this way in their character of *quasi*-co-plaintiffs, and as persons on behalf of whom the right is alleged."

Inclosure.

Rights of common of pasture have been largely extinguished by Inclosure, as where the owner of the waste incloses or "approves" so much of the waste as he pleases, provided he

(*c*) *Gateward's Case*, 6 Rep. 59*b* (see on this case *Goodman* v. *Mayor of Saltash*, 7 App. Ca. at p. 660); *Grimstead* v. *Marlowe*, 4 T. R. 719; *Att.-Gen.* v. *Mathias*, 4 K. & J. 579.

(*d*) Elph. N. & C. Interp. 612, 613.

(*e*) Williams on Commons, 16.

(*f*) *Commissioners of Sewers* v. *Glasse* L. R. 7 Ch. 465. See *Goodman* v. *Mayor of Saltash*, 7 App. Ca. 633.

(*g*) "Easement" is not properly used to describe a right of common, which is a *profit à prendre*.

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leave sufficient for those entitled thereto; or where a person without any title originally, by mere encroachment, has taken part of the waste and has acquired an absolute title by holding it for twenty years (*h*). But by a general Inclosure Act, passed in 1845, 8 & 9 Vict. c. 118, subsequently amended and extended by several statutes, the Inclosure Commissioners for England and Wales (whose powers are now vested in the Board of Agriculture) (*i*) were appointed, under whose sanction inclosures may now be more readily effected, several local inclosures being comprised in one Act (*j*).

Commons Act, 1876.

But alarm having arisen by reason of the rapid inclosure of commons, and the effect thereof upon the health of the population, the Metropolitan Commons Acts, 1866 and 1869 (*k*), were passed to prevent the inclosure of commons within the metropolitan police district, and for the management and improvement of such commons; and these were followed by the Commons Act, 1876 (*l*). The reasons for it are fully set out in the preamble as follows:—

> "Whereas by the Inclosure Acts, 1845 to 1868, upon the application and with the consent of such of the persons interested in any common as in the said Acts in that behalf specified, the Inclosure Commissioners are empowered by provisional order under their seal to authorise the inclosure of such common, provided such inclosure is made on such terms and conditions as may appear to the Commissioners to be proper for the protection of any public interests, and provided also that the Commissioners are of opinion that such inclosure would be expedient, having regard as well to the health, comfort, and convenience of the inhabitants of any cities, towns, villages, or populous places in or near any parish in which the land proposed to be inclosed, or any part thereof, may be situate (hereinafter included under the expression 'the benefit of the neighbourhood'), as to the advantage of the persons interested in the common to which such application relates (hereinafter included under the expression 'private interests'); but such provisional order is of no validity until and unless the Commissioners have, in a report to be laid before Parliament, certified that in their opinion the

(*h*) See Tudor L. C. R. P. p. 149, notes to *Tyrringham's Case*. Inclosure might be effected by agreement, but it was generally carried out by private Acts of Parliament, subject to the General Inclosure Act (41 Geo. III. c. 109); see Woolrych on Commons, 318; Williams on Commons, 245.

(*i*) Under the Board of Agric. Act, 1889 (52 & 53 Vict. c. 30), s. 2, which transfers to the Board the powers and duties of the Land Commissioners, in whom the Inclosure Commissioners were merged by the Settled Land Act, 1882 (45 & 46 Vict. c. 38, s. 48).

(*j*) Tudor's L. C. R. P. p. 151. See Woolrych on Commons, 319; and Williams on Commons, 251, as to this Act.

(*k*) 29 & 30 Vict. c. 122; 32 & 33 Vict. c. 107.

(*l*) 39 & 40 Vict. c. 56.

inclosure of such common, if made on the terms and conditions in their provisional order expressed, would be expedient, having regard to the benefit of the neighbourhood, as well as to such private interests as aforesaid, nor until and unless an Act of Parliament has been passed confirming such order and affirming such certificate as aforesaid, and directing that the proposed inclosure of the common should be proceeded with accordingly:

"And whereas by the said Inclosure Acts, information is required to be supplied and inquiries to be made for the purpose of enabling the Inclosure Commissioners to judge of such expediency as aforesaid, but it is desirable to make further provisions for bringing under the notice of the said Commissioners, and of Parliament, any circumstances bearing on the expediency of allowing the inclosure of a common, and that inclosure in severalty as opposed to regulation of commons should not be hereinafter made unless it can be proved to the satisfaction of the said Commissioners and of Parliament that such inclosure will be of benefit to the neighbourhood as well as to private interests, and to those who are legally interested in any such commons:

"And whereas by the said Inclosure Acts the Commissioners are empowered, in the case of a common being waste land of a manor, to require, and in their provisional order to specify as one of the conditions of inclosure, the appropriation of an allotment for the purposes of exercise and recreation by the inhabitants of the neighbourhood, and also of an allotment for the labouring poor, and it is expedient to give further effect to the provisions relating to the said allotments (in this Act referred to as 'allotments for recreation grounds and field gardens'):

"And whereas it is expedient to give further facilities for enabling the Inclosure Commissioners to regulate, improve, stint, and otherwise deal with commons without wholly inclosing and allotting the same in severalty."

Thus, rights of Common, though probably very beneficial in the age and state of agriculture in which they originated, in later days were supposed to be injurious to agriculture, and accordingly the Legislature interfered to put an end to them by the separate inclosure of the lands subject to the rights. But now, on the other hand, the Legislature is checking the inclosures, for fear that, while private interests may be benefited by them, the health of the community may suffer.

Turbary.

Common of Turbary is the right to dig turves in the lord's waste or another man's land to burn as fuel in a house (*m*).

Piscary.

A right of fishing in the water of another is a species of *profit à prendre*. It may be either a "Common of Piscary," *i.e.*, a

(*m*) Elph. N. & C. Interp. 627. It is not a right to cut green turf, but turf in the nature of peat, fit for fuel.

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right to fish in common with the owner of the soil, or a several fishery (*n*).

Easements.

Continuous.

Discontinuous.

Easements are divided into continuous and discontinuous. Easements of the former class are those which may be enjoyed without anything being done by the owner of the dominant tenement; as a right of drainage, or to the enjoyment of light and air. Easements of the latter class can only be enjoyed by the act of the owner of the dominant tenement; as a right of way, or the right to draw water (*o*).

Positive.

Negative.

Easements are also, as has already been said, divided into positive and negative. A positive easement is the right of the owner of the dominant tenement to do something on the servient tenement; a negative easement is the right of the owner of the dominant tenement to prevent the owner of the servient tenement from doing something on it.

Quasi-easements, where both tenements have the same owner.

A man cannot have an easement over his own land. For example, if the owner of two tenements, A. and B., drains A. by a sewer running under B., or habitually has access to A. by a road over B., the right of drainage, or of using the road, is not an easement over B.; it is merely the exercise by the owner of B. of one of his rights as such owner. Rights of this nature, which would be easements if the two tenements belonged to different owners, are sometimes called "*quasi*-easements," but more commonly, through an erroneous use of the word, "easements" simply.

Right of purchaser of one tenement.

Where the owner sells a tenement, in respect of which he exercises *quasi*-easements over another tenement belonging to him, the question whether those *quasi*-easements pass by the conveyance depends upon the intention expressed in it. But, in the absence of any expression of intention, *quasi*-easements which are continuous and apparent, and necessary to the enjoyment of the tenement granted and have been used therewith before and up to the time of the conveyance pass (*p*).

By "apparent" *quasi*-easements are meant not only those which must necessarily be seen, but those which may be seen or

(*n*) See Williams on Commons, Lect. xviii.; and see as to the different kinds of fishery, Elph. N. & C. Interp. 576.

(*o*) Lord Blackburn has traced the distinction between continuous and discontinuous easements to the authors of the *Code Napoléon*, and observes that it is not to be found in any English law authority before *Gale* on Easements in 1839; *Dalton* v. *Angus*, 6 App. Cas. at p. 821.

(*p*) Elph. N. & C. Interp. 189.

known on careful inspection by a person ordinarily conversant with the subject. By "necessary" is meant necessary for the comfortable enjoyment of the tenement as it existed before the severance.

Right of way over land retained by vendor.

Although a way is not a continuous easement, still a road generally used for the access to the tenement sold over a tenement retained by the vendor will pass by the conveyance of the former (*q*) if (1) it is over a specific and defined part of the tenement retained, as distinguished from the case where the owner of both tenements has passed over the tenement retained, but not in any defined track; and (2) the convenience of user does not cease upon the sale.

The general words inserted in conveyances of lands before 1882 (*r*) commonly included "ways usually enjoyed therewith," and these words were sufficient to pass a way used by way of *quasi*-easement by the vendor over land retained by him.

Way of necessity.

Where a man, having a close surrounded by his own land, grants the close, the grantee shall have a way to his close over the grantor's land without any express words; for without it he cannot derive any benefit from his grant (*s*). This way is called "a way of necessity." In like manner, if a man grants the land surrounding his close, and retains the close, he has a way of necessity to the close; but in this case he has not a way for all purposes, but only so as to enable him to enjoy the close in the condition that it was in at the time of the grant (*t*).

Tithes and advowsons.

Tithes constituted part of the provision for the ministers of the Church, being a fund for their maintenance issuing out of land, and amounting to a tenth part of the yearly increase of the soil. Originally, everyone was at liberty to contribute his tithes to whatever church or priest he liked (*u*). The whole soil of the country, however, becoming divided into certain ecclesiastical districts called parishes, the tithes of each parish became dedicated to the support of the church of the parish out of which they issued, and were payable accordingly to the incumbent. Under recent Acts (*x*) of Parliament a rent-charge,

(*q*) Elph. N. & C. Interp. 197. See also *Bayley* v. *G. W. R. Co.*, 26 Ch. D. 434; *Brown* v. *Alabaster*, 37 Ch. D. 490; *Thomas* v. *Owen*, 20 Q. B. D. 225; *Roe* v. *Siddons*, 22 Q. B. D. 224.

(*r*) *Ante*, p. 334.

(*s*) Elph. N. & C. Interp. 191.

(*t*) *Corporation of London* v. *Riggs*, 13 Ch. D. 798.

(*u*) 2nd Instit. 646. See as to tithes, 3 Cruise, Dig. 37 *et seq.*

(*x*) The Tithe Commutation Act, 6 & 7 Wm. IV. c. 71, amended by 7 Wm. IV. & 1 Vict. c. 69; 1 & 2 Vict. c. 64 2

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varying with the price of corn, has now been substituted for tithes in kind.

Appropriations.

Where an ecclesiastical benefice is annexed in perpetuity to a spiritual corporation or college it is called "an appropriation" (y). On the dissolution of the monasteries the appropriations belonging to them were vested in the Crown by Statute (z). Spiritual persons or corporations were always capable of having their land discharged from tithes in various manners (a). On the dissolution of the monasteries most of the exemptions from tithes on their lands would have ceased, but for the provisions of the statute (b) which provides that all persons coming into the possession of the lands of any abbey then dissolved should hold them free and discharged from tithes in as large and ample manner as the abbey formerly held them, but this provision does not extend to the lands of the lesser monasteries. Many grants by the Crown have been made either of the land itself belonging to a dissolved monastery, which may, as above stated, be free from tithes in the hands of the grantee, or of an appropriation (c), which in lay hands is called an "impropriation," or of the tithes forming part of the appropriation.

Tithe free lands.

Tithes in lay hands.

Tithes, after they were diverted from their original purpose and had become the subject of property, would not pass on a conveyance of the land with its appurtenances, if not specially mentioned (d).

Apportionment of tithes.

Under the Tithe Commutation Act (e), the rent-charge in lieu of tithes may be specially apportioned, so as to throw the amount attributable to the tithes of an entire estate upon some particular portions, in exoneration of the residue (f).

Merger.

Under the Commutation Acts, a tenant in fee simple or in tail in possession of tithes or rent-charge in lieu of tithes, or any person having power to acquire a fee simple therein, or the tenant for

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& 3 Vict. c. 62; 3 & 4 Vict. c. 15; 5 & 6 Vict. c. 54; 9 & 10 Vict. c. 73; 10 & 11 Vict. c. 104; 23 & 24 Vict. c. 93; 31 & 32 Vict. c. 89; 41 & 42 Vict. c. 42; 49 & 50 Vict. c. 54; see 2 Da. i. 627.

(y) Elph. N. & C. Interp. 561.

(z) 27 H. 8, c. 28; 31 H. 8, c. 13.

(a) 2 Bl. 32. The Bishop of Winchester's Case, 2 Rep. 44 a, note by Fraser. Tomline, Law Dict. s. v. Tithes.

(b) 31 H. 8, c. 13.

(c) Burton, Comp. R. P. 375, and 5 Cruise, Dig. 134. See Elph. N. & C. Interp. 617, s.v. *Rectory;* and Shep. T. 12, 94, 213, 230; 3 Salk. 377; Com. Dig. *Ecclesiastical Persons*, c. 6. "Parsonage" is equivalent to "rectory;" see Co. Litt. 300 a; *ib.* 341; Shep. T. 94.

(d) *Ib.*; and see 2 Da. i. 627; and 5 Da. ii. 225.

(e) 6 & 7 Wm. IV. c. 71, s. 58.

(f) See 2 Da. i. 627: and 5 Da. ii. 223, note.

life in possession of both lands and tithes, was enabled, by deed to be approved by the Tithe Commissioners, and confirmed under their seal, to merge the tithes or commutation rent-charge in the land out of or in respect of which they issue. And all charges on tithes, &c., which are merged under the Acts are to have priority over any charges on the lands at the time of the merger.

Land presumed subject to tithe.

On the sale of land, tithe rent-charge is a burden the existence of which is presumed in the absence of agreement (*g*). The Commissioners under the Acts have power in making their award to decide as between tithe-owner and land-owner, but not as between rival claimants of tithes (*h*). The powers and duties of the Tithe Commissioners are now vested in the Board of Agriculture (52 & 53 Vict. c. 30). Where there has been a special apportionment of the rent-charge upon some particular portion of the estate in exoneration of the residue, the contract or conditions of sale should state either the fact or the amount actually payable (*i*).

Title on sale of tithe.

Upon the sale of tithes the vendor should protect himself from being required to produce the original grant (*k*), otherwise the abstract must show the original grant, as well as a sixty (or forty) years' title (*l*). Production of the original grant is the only mode of repelling any claim by an ecclesiastical person *jure ecclesiæ* (*m*). How far the same rule may be applicable to a sale of a rent-charge in lieu of tithe may be doubtful, but it is certain that to prevent any question the vendor should protect himself by a condition properly framed as to the title he is to adduce.

Advowsons, origin of.

To every parish now is attached a church in which religious worship according to the forms of the Established Church is solemnized. The origin of these churches is, for the most part, their erection at an early date by the then lord of the manor, and his endowment of them (beyond the tithes) with a Glebe or grant of land for the maintenance of the priest, and on which a house was built for his residence (*n*). This establishment of the Church

(*g*) Dart, V. & P. 399.

(*h*) *Ib.* 400.

(*i*) *Ib.* 400, 401. In the absence of express stipulation, a purchaser cannot require the vendor to procure apportionment at the vendor's expense; *Re Ebsworth and Tidy*, 42 Ch. D. 23, 35.

(*k*) Dart, V. & P. 188.

(*l*) Dart, V. & P. 336, and see note (*t*), and 2 Da. i. 32, note, as to whether or not s. 1 of V. & P. Act, 1874 (37 & 38 Vict. c. 74), applies to tithes, so as to make forty years' title sufficient.

(*m*) Smith's Law of R. & P. Prop., 46.

(*n*) See the Glebe Lands Act, 1888 (51 & 52 Vict. c. 20), as to sales of glebe lands by incumbents of benefices with approval of the Land Commissioners (now the Board of Agriculture); 2 K. & E. 613.

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and its endowment gave the right for all time to come of nominating the minister to officiate in the Church, which right was called an "advowson" (*o*).

So long as matters remained in their original state—that is, so long as there was no severance of the advowson from the manor, it was termed an "advowson appendant." But the owner might grant his advowson away to another and so sever it from the manor, or might sever it by conveyance of the manor with express exception of the advowson (*p*). And then it became what is termed an "advowson in gross;" in such case it must be conveyed, like any other separate incorporeal hereditament, by a deed of grant (*q*). The severance once complete, the advowson could not again become appendant, though the manor and advowson become reunited in the same person (*r*). When not severed, the advowson would pass with the manor, even without mention of the appurtenances (*s*).

The advowson itself may become the subject of division; the owner may grant to another the right to the next presentation. But in case the grantee die before exercising the right, the right will pass to his personal representatives, and not descend to the heir, as the advowson would descend on the death of the owner intestate (*t*).

Title on sale of advowson.

The Statute 3 & 4 Wm. IV. c. 27 (*u*) provides that no advowson shall be recovered but within three incumbencies, and that period must not extend beyond one hundred years (*x*); in the absence of agreement, Mr. Dart says (*y*):—

"The title to an advowson must be carried back at least one hundred years; and the abstract should be accompanied by a list of the presentations during the period over which it extends. The rule, it is conceived, is the same, whether the advowson be sold as in gross or appendant; for although a sixty or now a forty years' title might be sufficient, if it could be shown that the advowson was in fact appendant to the principal estate, yet the purchaser, it may be contended, has a right to see that no destruction of the appendancy, by severance of the advowson, is disclosed by the earlier title" (*z*).

(*o*) See 3 Cruise, Dig. pp. 1 *et seq.*; Elph. N. & C. Interp. 558, s.v. *Advowson*; and *Crompton* v. *Jarratt*, 30 Ch. D. 298.

(*p*) 2 Da. i. 31, note.

(*q*) Co. Litt. 335*b*.

(*r*) 2 Da. i. 31, note.

(*s*) 2 Bl. 22.

(*t*) *Rennell* v. *Bishop of Lincoln*, 7 B. & C. 113; and 8 Bing. 490. As to the statutes against simony—31 Eliz. c. 6; 1 Wm. & Mary, c. 16, and 12 Anne, c. 12; and their effect, see 2 Da. i. 32, and *Walsh* v. *Bishop of Lincoln*, L. R. 10 C. P. 518; and notes to *Fox* v. *Bishop of Chester*, Tudor, L. C. R. P. 276.

(*u*) S. 30.

(*x*) Ss. 30—33.

(*y*) Dart's V. & P. 334.

(*z*) See 2 Da. i. 30, for form of agreement for purchase of advowson with

Offices and dignities (*a*) hardly fall within the limits of this book.

Franchise.

A franchise is a royal privilege or branch of the royal prerogative, subsisting in the hands of a subject by virtue of a grant from the Crown, either express or implied from long enjoyment. The principal franchises are (1) liberties to hold Courts; (2) grants of *jura regalia* and Counties Palatine; (3) grants of forest; (4) liberty to make a park; (5) free warren; (6) the right to have the goods of felons; (7) to have waifs and strays; (8) to hold a fair or market; (9) to keep a ferry (*b*).

Annuity.

"An annuity is a yearly payment of a certain sum of money granted to another in fee for life or years, charging the person only (*c*)."

Where it is limited for an estate of inheritance, it is a hereditament. Words of limitation, which, when applied to land, create an estate tail, when applied to a personal annuity create a fee simple conditional (*d*), for it cannot be entailed, as it is not a tenement within the Statute *De Donis* (*e*), but it is a personal hereditament.

Like remarks apply to certain annuities granted by the Crown and charged on Customs duties or other branches of the public revenue (*f*).

Rents.

"Three manner of rents there be, that is to say, rent service, rent charge, and rent seck. Rent service is where the tenant holdeth his land of his lord by fealty and certain rent, or by homage, fealty, and certain rent, or by other services and certain rent. And if rent service at any day, that ought to be paid, is behind, the lord may distrain for that of common right (*g*)."

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prospect of early possession, and at p. 356, form of grant of an advowson with the addition thereto at p. 357, note, to meet the Incumbents' Resignation Act, 1871; and see form of grants of advowsons, 1 K. & E. 611.

(*a*) Cruise, Dig. vol. iii. tit. xxv. xxvi.; and see Cruise on Dignities.

(*b*) See as to franchises, 3 Cruise, Dig. 244; Chitty on Prerog. 118 *et seq.*; Elph. N. & C. Interp. 581, and the authorities there cited. As to Courts, see *ib.* 568, 592, and a most interesting article in Law Quarterly Review, vol. v. p. 113 (add to the authorities there cited *Pitt* v. *Revers*, Cro. El. 791). As to Counties Palatine, Elph. N. & C. Interp. 568. As to forests, *ib.* 580; park, *ib.* 606; warren, *ib.* 629; waifs and strays, *ib.* 573; fairs and markets, *ib.* 595; ferry, *ib.* 574, where the cases are collected. Forfeiture of goods for felony was abolished by 33 & 34 Vict. c. 23.

(*c*) Co. Litt. 144*b*.

(*d*) *Turner* v. *Turner*, Amb. 776.

(*e*) *Ante*, p. 61.

(*f*) *Stafford* v. *Buckley*, 2 Ves. Sen 170; *Holdernesse* v. *Carmarthen*, 1 Bro. C. C. 377.

(*g*) Litt. s. 213; and see Elph. N. & C. 617; s.v. *Rents*.

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Rent service can only be created where a tenure is created, and therefore it cannot be created on a grant in fee simple since the Statute of *Quia Emptores;* in other words, since that Statute, it can only be created where an estate of freehold less than a fee simple, or an estate for years is created, leaving a reversion in the grantor.

Rent-charge and rent-seck.

A rent-charge and a rent-seck are thus defined by Littleton (*h*) :—

"If a man by deed indented at this day (*i*) maketh such a gift in fee tail, the remainder over in fee; or a lease for life, the remainder over in fee; or a feoffment in fee; and by the same indenture he reserveth to him and to his heirs a certain rent, and that if the rent be behind, it shall be lawful for him and his heirs to distrain, &c.: such a rent is a rent-charge; because such lands or tenements are charged with such distress by force of the writing only, and not of common right. And if such a man, upon a deed indented, reserve to him and his heirs a certain rent without any such clause put in the deed, that he may distrain, then such rent is rent-seck; for that he cannot come to have the rent, if it be denied, by way of distress."

By 4 Geo. II. c. 28, the power of distress was made incident also to a rent-seck.

Before 1882 it was the practice to give, by way of further security for a rent-charge, power to the grantee on the rent being in arrear for forty days to enter on the land charged and to retain possession till his claim was satisfied out of the rents and profits. And by the Conveyancing and Law of Property Act, 1881 (*k*), under instruments coming into operation after 1881, if and as far as a contrary intention is not expressed thereby, where a person is entitled to receive out of any land, or its income, any annual sum charged on the land or income, by way of rent-charge or otherwise, not being rent incident to a reversion, he is to have, so far as they might have been conferred by the instrument, the following remedies—namely: (1) distress after twenty-one days' arrear, for arrears; (2) entry and possession till payment, after forty days' arrear, for arrears then due, or becoming due during his possession; and (3) also after forty days' arrear, whether taking possession or not, by deed (*l*) to demise the land charged to a trustee for a term by mortgage, sale, or demise, or by any other reasonable means, to raise and pay the annual sum

Conveyancing Act, 1881.

Remedies.

(*h*) S. 217.

(*i*) *I.e.*, since the Statute of *Quia Emptores.*

(*k*) 44 & 45 Vict. c. 41, s. 44.

(*l*) See example, 3 Da. ii. 1049.

and all arrears due or to become due. These provisions closely resemble the express power usually inserted in settlements made before 1882 for securing an annuity on the land, except that it was more common to limit a term instead of giving power to limit one (*m*).

Escheat.

Formerly there was no escheat of a rent-charge, for it was not held of any lord, and on the death of the owner intestate and without heirs, it simply ceased to exist. But now by the Intestates Estates Act, 1884, the law of escheat will apply where after the 14th August, 1884, a person dies "without an heir, and intestate in respect of any real estate consisting of any estate or interest, whether legal or equitable, in any incorporeal hereditament" (*n*); but there is some difficulty in seeing how this provision can apply to a rent-charge, which is held of no lord.

Redemption.

By the Conveyancing and Law of Property Act, 1881 (*o*), provision is made, on the requisition on the owner of the land, or of any person interested therein, out of which a rent-charge or other annual sum issues, for payment to the person absolutely entitled thereto in fee simple in possession, or empowered to dispose thereof absolutely or to give an absolute discharge for its capital value, of such sum as is certified by the Board of Agriculture (*p*) to be its value. Thus redemption may be effected of any "quit rent," "chief rent," "rent-charge, or other annual sum," but not of a tithe rent-charge, or rent reserved on a sale or lease, or rent payable under a grant or licence for building purposes, or any payment issuing out of land not being perpetual.

Chief rents.

"Chief rents" are the fixed rents paid by the freeholders of a manor, and they, and also rents paid by the copyholders, are called "quit rents" (*q*), because thereby the tenant goes free of all other services (*r*).

Quit rents.

Annuities, by way of rent-charge.

Annuities, by way of rent-charge, whether for life or years, or in fee, are often limited by wills and settlements. A rent-charge may be created by grant operating at common law; but in this case, the grantee has not seisin of the annuity until some payment has been made in respect of it. It is more commonly created by a conveyance of the land itself to the use that the

(*m*) See 3 Da. ii. 1039 and 1041.

(*n*) 47 & 48 Vict. c. 71, ss. 4, 7.

(*o*) 44 & 45 Vict. c. 41, s. 45; and 45 & 46 Vict. c. 38 (Settled Land Act, 1882), s. 48.

(*p*) Substituted for the Land Commissioners by 52 & 53 Vict. c. 30, s. 2.

(*q*) *Quieti reditus.*

(*r*) 2 Bl. 42.

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grantee shall take the rent, in which case the grantee is in possession on the execution of the deed by virtue of the Statute of Uses (*s*). Where an annuity or rent-charge has been granted, otherwise than by marriage settlement, or will, for one or more life or lives, or for any term of years, or greater estate determinable on one or more life or lives, it must be registered in order to affect lands as to purchasers, mortgagees, or creditors, according to the provisions of the Act for the Protection of Purchasers against Judgments (*t*). But, notwithstanding that the annuity deed has not been registered, the annuity will be valid against all subsequent incumbrancers who take with notice, and against the trustee in bankruptcy of the grantor (*u*). The statutory provisions as to executions (*x*) do not apply to annuities, therefore on a purchase or mortgage search should also be made in respect of them in the Central Office of the Supreme Court of Judicature (*y*).

Fee-farm rents.

A common form of rent-charge is that known as "fee-farm," and arises where land is sold for building purposes and granted in fee-simple subject to a perpetual rent-charge. Formerly (*z*), it was essential to reserve a power of distress; for since the Statute of *Quia Emptores*, the grantor parting with the fee is without any reversion, and without a reversion there cannot be a rent-service: so the rent reserved in such case, if power of distress were not expressly given, would be a rent-seck (*a*). The true meaning of "fee-farm" seems to be a perpetual farm or rent; the name being founded on the perpetuity of the rent (*b*). In order to effectually secure the payment of the rent-charge, the purchaser is usually made to covenant to erect buildings of a certain value, and to keep them in repair (*c*). But it has been recently decided that where land has been granted in fee, in consideration of a rent-charge, and a covenant to build and repair buildings, the assignee of the grantee of the land is not liable, either at law, or in equity, on the ground of notice, to the

(*s*) 27 Hen. VIII. c. 10, ss. 4, 5; *ante*, p. 266; Elph. Introd. 24; *Heelis* v. *Blain*, 18 C. B. N. S. 90. See forms in Dav. Conc. Prec. 166, 468.

(*t*) 18 & 19 Vict. c. 15, ss. 12, 14.

(*u*) *Greaves* v. *Tofield*, 14 Ch. D. 563.

(*x*) *Post*, p. 368 *et seq.*

(*y*) See Elph. & Cl., Searches, 107, 108.

(*z*) Before 4 Geo. II. c. 28; *ante*, p. 346.

(*a*) *Reditus siccus.* The above is the reason given by Mr. Hargrave (note 5), 143*b*, Co. Litt., quoting Littleton, 215, 216.

(*b*) Not on the *quantum*, as represented by Blackstone, vol. ii. 43; see Mr. Hargrave's note to Co. Litt. 143*b*.

(*c*) See forms, 2 Da. i. 504; and Da. Conc. Prec. 165.

assignee of the grantee of the rent-charge, on the covenant to repair (*d*). Also to secure the rent-charge the purchaser is made to covenant to pay the rent. But it may now be taken as settled law that the obligation of such a covenant cannot run with the land so as to bind the assignee of the purchaser though he take with notice (*e*).

Apportionment.

Formerly, a rent-charge could not be apportioned, "because the rent is entire and against common right, and issuing out of every part of the land (*f*)," and there is no tenure between the grantor and grantee as there is in the case of a rent-service. Therefore, if the owner of a rent-charge purchased any part of the land out of which it issued (*g*), or any part of the land were released from it, the rent-charge became extinct (*h*). But by one of the Inclosure, &c., of Lands Acts (*i*), provision was made for apportionment of the rent by the Inclosure Commissioners (now the Board of Agriculture) (*k*), among the lands charged on the application of any persons respectively interested in the lands and in the rent, in all cases where any lands or hereditaments are charged with any fee-farm rent, rent-seck, rent of assize (*l*), or chief rent, or other annual or periodical fixed rent, or other certain payment. And then by the Act to further Amend the Law of Property, 1859 (*m*), such person was enabled to release part of the land charged without thereby extinguishing the charge: the Act provided:—

Release.

> S. 10. "The release from a rent-charge of part of the hereditaments charged therewith shall not extinguish the whole rent-charge, but shall operate only to bar the right to recover any part of the rent-charge out of the hereditaments released, without prejudice

(*d*) *Haywood* v. *Brunswick Building Society*, 8 Q. B. D. 403; *ante*, p. 159, note.

(*e*) Dart, V. & P. 865; *ante*, p. 158. Before 3 & 4 Wm. IV. c. 27, s. 36, abolished real actions, a real action would lie for recovery of a rent-charge in fee; but that remedy having been abolished, an action of debt is maintainable: *Thomas* v. *Sylvester*, L. R. 8 Q. B. 368; see *Christie* v. *Barker*, 53 L. J. Q. B. D. 537; *Ex parte Graham*, 42 Ch. D. 343; *Searle* v. *Cooke*, 43 Ch. D. 519.

(*f*) Co. Litt. 147*b*.

(*g*) And this is still so where advantage is not taken of 17 & 18 Vict. c 97, to effect apportionment; see Dart, V. & P. 147, 1043.

(*h*) *Ib.* 1044.

(*i*) 17 & 18 Vict. c. 97, ss. 10, 14; and see 1 Da. 545, 687.

(*k*) 45 & 46 Vict. c. 38 (Settled Land Act, 1882), s. 48; 52 & 53 Vict. c. 30, s. 2.

(*l*) *I.e.*, the certain established rents of the freeholders and ancient copyholders of a manor, which cannot be departed from or varied—that is, the quit rents above spoken of; 2 Bl. 42.

(*m*) 22 & 23 Vict. c. 35, s. 10. See *Booth* v. *Smith*, 14 Q. B. D. 318.

nevertheless to the rights of all persons interested in the hereditaments remaining unreleased, and not concurring in or confirming the release."

In respect of lands required for public undertakings, special provision is made by the Lands Clauses Consolidation Act, 1845 (*n*), for the release of the lands required from any rent-charge affecting them, whether the whole or a part only be charged on them.

(*n*) 8 Vict. c. 18, ss. 115—118.

CHAPTER XIV.

CONVEYANCES—INVOLUNTARY ALIENATION.

PART I.—*Conveyances.*

OCCASIONAL reference has been made in former chapters to some of the different assurances or modes of Conveyance which have, from time to time, been employed for effecting the alienation of land, or creating interests in it. It will be proper, however, to treat of these modes of conveyance in more detail (*a*).

I. Feoffment.

The ancient mode of conveyance by a subject (*b*) was the Feoffment (*c*). It is applicable only to the conveyance of the freehold of corporeal hereditaments, in possession (*d*).

The words "feoffment," "to enfeoff" (*feoffare* or *infeudare*, to give one a fee simple (*e*)), express the process of conveyance by "livery of seisin"—that is, delivery of the corporeal possession of the land (*f*). A record of the conveyance was generally, but not necessarily, made in writing, called a Charter of Feoffment; but the land passed by the livery, not by the charter. It was the practice to endorse on the charter a memorandum that the livery had been made. It became usual for the feoffor to affix a seal to the charter by way of giving it greater solemnity; and such writing, sealed and delivered to any person, was called a deed (*factum*) (*g*).

(*a*) The forms of modern conveyances will be found in any of the collections of precedents in common use: they are explained in Elph. Introd. 81; 4 Cruise, Dig.; and Sanders on Uses, vol. ii.

(*b*) Conveyances by the Crown are of record, 5 Cruise, Dig. 45.

(*c*) As to feoffments, see Butler's note to Co. Litt. 271*b*; 4 Sweet's Jarman's Bythewood, 37; 4 Cruise, Dig. 46; Shep. T. 203; Digby, R. P. 48, 122; Challis, R. P. 321; Wms. R. P. ch. vii.

(*d*) 2 Bl. 310.

(*e*) See Spelm. Gloss., *s.v.* Feofare, where he points out that "feofare" is properly applied to fee simple, "donare" to fee tail: cf. Litt. s. 57. Mr. Challis (R. P. 322) remarks that "feoffment" is often but improperly applied to livery of seisin for any estate of freehold; see Butler's note (1) to Co. Litt. 271*b*.

(*f*) 2 Bl. 310 *et seq.*; Digby, R. P. 48*n*, 122. *Post*, p. 353.

(*g*) Coke (Co. Litt. 9*a*) says that there is a difference between a charter (*carta*) and a deed (*factum*), "for *carta* is intended a charter which doth touch inheritance." The usual form of delivery at the present day is to touch the seal and say "I deliver this as my act and deed." See more about deeds, Elph. Introd. 54; articles on "The Form and

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Operative words.

A charter of feoffment was in form an authentication of a previous transaction, and by it the feoffor declared that he had "granted and enfeoffed,"—referring thereby to the previous act, —and went on to add, "and he did thereby grant, enfeoff, and confirm" (*h*). If the usual "general words" (*i*) were inserted, the charter itself, as distinct from the livery, might pass certain rights which were usually enjoyed with, but which were not strictly appendant or appurtenant to the land of which livery was made.

Writing.

Writing was not essential until the reign of Charles II., A.D. 1677, when it was provided by the Statute of Frauds:—

Statute of Frauds. 29 Car. II. c. 3.

S. 1. "That from and after the 24th day of June, 1677, all leases (*k*), estates, interests of freehold or terms of years, or any uncertain interest of, in, to, or out of any messuages, manors, lands, tenements or hereditaments, made or created by livery and seisin only, or by parol, and not put in writing and signed by the parties so making or creating the same, or their agents thereunto lawfully authorised by writing, shall have the force and effect of leases or estates at will only, and shall not, either in law or equity, be deemed or taken to have any other or greater force or effect; any consideration for making any such parol leases or estates or any former law or usage to the contrary notwithstanding."

S. 3. "That no leases, estates, or interests, either of freehold or terms of years, or any uncertain interest, not being copyhold or customary interest, of, in, to, or out of any messuages, manors, lands, tenements or hereditaments, shall at any time after the said 24th day of June be assigned, granted, or surrendered, unless it be by deed or note in writing, signed by the party so assigning, granting, or surrendering the same, or their agents thereunto lawfully authorised by writing or by act and operation of law."

Deed.

By the Act to Amend the Law of Real Property (*l*), a feoffment made after the 1st of October, 1845, other than one made under a custom by an infant, is void at law unless evidenced by deed. Until that statute made corporeal hereditaments to "lie in grant" as well as "in livery," feoffments were used on

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Execution of Deeds," in 30 S. J. 636, 651, 667; the introduction and notes to Davidson's Precedents; and Wms. R. P. 174; and as to the conveyances now disused, see 2 Bl. 295; 4 and 5 Cruise, Dig.; Piggott on Recoveries. As to the construction of deeds, see Elph. N. & C., Interpretation of Deeds.

(*h*) See form, 2 Dav. 244; 2 Sanders on Uses, 102; and, for ancient forms, Digby, R. P. 60, 123; 2 Bl. Comm., Appendix, No. 1.

(*i*) See *ante*, p. 334.

(*k*) The second section of the Statute excepts leases not exceeding three years from the making, and on which a rent of two-thirds at least of the full improved value is reserved. See *ante*, p. 142.

(*l*) 8 & 9 Vict. c. 106, s. 3.

conveyances by corporations (*m*); for it was said a corporation could not stand seised to a use (*n*), and therefore the Lease and Release (*o*), which became the common form of assurance between individuals, could not be resorted to by a corporation, as the lease took effect under the Statute of Uses. Although a feoffment by an infant need not be evidenced by deed, it must be evidenced by writing, signed by the infant, who, at the time of the feoffment, must be in actual possession of the land (*p*).

Livery of seisin was of two kinds—livery "in deed," and livery "in law." They are thus described by Blackstone (*q*):—

Livery of seisin,

—in deed.

"Livery in Deed is thus performed. The feoffor, lessor, or his attorney, together with the feoffee, lessee, or his attorney (for this may as effectually be done by deputy or attorney, as by the principals themselves in person), come to the land, or to the house; and there in the presence of witnesses, declare the contents of the feoffment or lease, on which livery is to be made. And then the feoffor, if it be of land, doth deliver to the feoffee, all other persons being out of the ground, a clod or turf, or a twig or bough there growing, with words to this effect: "I deliver these to you in the name of seisin of all the lands and tenements contained in this deed." But, if it be of a house, the feoffor must take the ring, or latch of the door, the house being quite empty, and deliver it to the feoffee in the same form; and then the feoffee must enter alone, and shut to the door, and then open it, and let in the others. If the conveyance or feoffment be of divers lands, lying scattered in one and the same county, then in the feoffor's possession, livery of seisin of any parcel, in the name of the rest, sufficeth for all; but, if they be in several counties, there must be as many liveries as there are counties. For, if the title to these lands comes to be disputed, there must be as many trials as there are counties, and the jury of one county are no judges of the notoriety of a fact in another. Besides, anciently this seisin was obliged to be delivered *coram paribus de vicineto*, before the peers or freeholders of the neighbourhood, who attested such delivery in the body or on the back of the deed: according to the rule of the feudal law, *pares debent interesse investituræ feudi, et non alii:* for which this reason is expressly given; because the peers or vassals of the lord, being bound by their oath of fealty, will take care that no fraud be committed to his prejudice, which strangers might be apt to connive at. And though, afterwards, the ocular attestation of the *pares* was held unnecessary, and livery might be made before any credible witnesses, yet the trial, in case it was disputed (like that of all other attestations) was still reserved to the *pares* or jury of the county. Also, if the lands be out on lease, though all lie in the same county, there must be as many liveries as there are tenants: because no livery can be made in this case, but by the consent of the particular tenant; and the consent of one will not

(*m*) 2 Da. i. 177.

(*n*) *Ante*, p. 284; 1 Cruise, Dig. 340; 4 *ib.* 49.

(*o*) *Post*, p. 359.

(*p*) As to feoffments by infants, see 2 G.R.P.

Dav. 245, note; 4 Cruise, Dig. 49; Challis, R. P. 325.

(*q*) 2 Bl. 315. See 4 Cruise, Dig. 46; Challis, R. P. 325.

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bind the rest. And in all these cases it is prudent, and usual to endorse the livery of seisin on the back of the deed, specifying the manner, place, and time of making it: together with the names of the witnesses. And thus much for livery in deed.

Livery in law.

"Livery in Law is where the same is not made on the land, but in sight of it only; the feoffor saying to the feoffee, "I give you yonder land, enter and take possession." Here, if the feoffee enters during the life of the feoffor, it is a good livery, but not otherwise; unless he dares not enter, through fear of his life or bodily harm; and then his continual claim, made yearly, in due form of law, as near as possible to the lands, will suffice without an entry. This livery in law cannot, however, be given or received by attorney, but only by the parties themselves."

Tortious operation.

At common law any person in possession of the land, even if he were only tenant for life or for years, or had no estate in the land (*r*), could make a feoffment. If the feoffor was not seised, or if, being seised, he attempted to convey an estate greater than his own estate, the feoffment, by what was called a tortious operation, divested the whole fee simple out of the true owner (*s*), and it therefore necessitated a re-entry on his part in order to revest in himself the estate of which he had been thus disseised (*t*). As we have seen, it has in the present reign (*x*) been enacted that a feoffment made after 1st October, 1845, shall not have any tortious operation.

"Discontinuance" by tenant in tail.

A feoffment by a tenant in tail who was actually seised operated as a "discontinuance" of the tenancy in tail, and divested all remainders and the reversion expectant on the estate tail, and the only remedy of the issue in tail and the remaindermen or reversioners was a real action (*y*).

Limitation.

By the charter of feoffment was marked out the interest which the feoffee was to take under it, whether for life, in tail, or fee; and this was called "limiting" the estate. In modern times this limiting of the estate is still necessary in a feoffment or in any other description of assurance (*z*).

II. Grant.

From its nature, a feoffment is applicable only to a conveyance of land in possession. Where the subject-matter does not admit

(*r*) 4 Cruise, Dig. 50 (s. 30); *Fitzherbert* v. *Fitzherbert*, Cro. Car. 483; *Whaley* v. *Tankard*, 2 Lev. 52; *Parkhurst* v. *Smith*, Willes, 341; Mr. Butler's note to Co. Litt. 330*b*; Challis, R. P. 328; 4 Sweet's Jarman's Bythewood, 43.

(*s*) See, for an exception, Challis, R. P. 328, note.

(*t*) Litt. s. 611.

(*x*) 8 & 9 Vict. c. 106, s. 4.

(*y*) 2 Bl. 275; Challis, R. P. 329; Litt. s. 595; Co. Litt. 326 *b*. As to the effect of warranty in barring an estate tail which was discontinued, see 6 Law Quarterly Rev. 280.

(*z*) As to limitations in fee simple, see *ante*, p. 79, and in tail, *ante*, p. 59.

of livery of seisin, as, for example, an incorporeal hereditament; or is not in immediate possession, as, for example, a remainder or reversion, it is not a fitting subject for an assurance of this nature. Interests of this kind were from an early time conveyed by what is termed a "grant" (*a*), that is, a deed unaccompanied by livery of seisin; and therefore corporeal hereditaments, where the right to possession is immediate, are said to "lie in livery," while those in expectancy, or incorporeal hereditaments, are said to "lie in grant."

But a reversion on a lease for years may be conveyed by feoffment with livery of seisin, with the consent of the tenant for years (*b*), for the owner in fee simple has not parted with the seisin, but only placed as it were a bailiff on his property (*c*).

Attornment.

Until the Act 4 Anne, c. 16, in every case of a grant of an estate in remainder or reversion after an estate of freehold or a term of years, the attornment of the tenant was necessary to complete its effect (*d*).

Grant does not operate by wrong.

There being no livery of seisin, a grant did not operate by wrong, but only passed that which might be rightfully granted, and grants are therefore sometimes called "innocent conveyances" (*e*).

Operative words of grant.

The operative word usually employed in grants is "grant"; but other words suffice if they show an intention to convey (*f*).

By the Conveyancing and Law of Property Act, 1881 (*g*), it is declared that the use of the word "grant" is not necessary to convey tenements or hereditaments, corporeal or incorporeal.

Since the Act to Amend the Law of Real Property (*h*), which provided that from the 1st October, 1845, all corporeal tenements and hereditaments should, as regards the conveyance of the immediate freehold thereof, be deemed to lie in grant as well as in livery, a simple deed of grant will convey, and is the ordinary mode of conveying, the freehold in possession, as well as remainders, reversions, and incorporeal hereditaments (*i*).

(*a*) Co. Litt. 172*a*; 4 Sweet's Jarman's Bythewood, 105; 2 Sand. Uses, 29. See, however, an article on "Feoffment and Livery of Incorporeal Hereditaments," by L. O. Pike, in 5 Law Quarterly Rev., p. 29.

(*b*) Co. Litt. 48*b*, note 8.

(*c*) *Ante*, p. 149.

(*d*) *Ante*, p. 162.

(*e*) Co. Litt. 332*a*.

(*f*) Shep. T. 232; Elph. N. & C. Interp. 42.

(*g*) 44 & 45 Vict. c. 41, s. 49. *Post*, p. 362.

(*h*) 8 & 9 Vict. c. 106, s. 2.

(*i*) See form, 2 Da. i. 229. And as to the effect of the word "grant" in implying

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Covenants for title,

It was the practice in conveyances of freeholds for valuable consideration made before 1882, to insert the following covenants, called "covenants for title" (*k*) by the vendor beneficially entitled, that is to say—(1) a covenant (called the covenant for right to convey) that, notwithstanding anything done or omitted by the vendor or his ancestors or testators, the parties conveying have power to convey the property to the purchaser for the estate expressed to be limited; (2) a covenant (called the "covenant for quiet enjoyment") against any lawful disturbance by the vendor or anyone lawfully claiming through him, or through his ancestors or testators; (3) a covenant (called the "covenant against incumbrances") for freedom from incumbrances created by the vendor, or his ancestors or testators; and (4) a covenant (called the "covenant for further assurance") by the vendor, and all persons lawfully claiming through him, his ancestors or testators. It was formerly usual to preface these covenants by a covenant, that notwithstanding anything done by the vendor, his ancestors or testators, the conveying parties were seised in fee; or, where the conveyance was by appointment, that the power was well created and is in force; but such a covenant being obviously implied in the covenant for right to convey, its use was for some years before 1882 generally abandoned (*l*).

—qualified, in conveyances on sale;

It will be observed that these covenants are "qualified," *i.e.*, that they extend only to the acts and omissions of the vendor, his ancestors and testators, *i.e.*, persons through whom he derives title, otherwise than by purchase for value, and persons claiming under them. These covenants, so qualified, do not warrant that the vendor has a title, but only that he conveys the estate as he received it, and not in any way made worse by his own acts or those of the persons against whose acts he covenants (*ll*).

—absolute, in mortgages.

In a mortgage in fee simple, similar covenants without words of qualification were inserted, and the covenants are said to be absolute, *i.e.*, they extend to predecessors in title who were purchasers for value, as well as to ancestors and testators (*m*).

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covenants for title, see Co. Litt. 384*a*; 4 Cruise, Dig. 357; Elph. Introd. 91.

(*k*) See Elph. N. & C. Interp. 473.

(*l*) See 2 Dav. pt. i. p. 191; Elph. Introd. 103; 1 K. & E. 425.

(*ll*) See per Lord Eldon, C. J., in *Browning* v. *Wright*, 2 B. & P. 13, cited in Elph. N. & C. Interp. 475. The absence of a warranty is supplied by investigation of title; see Wms. R. P. 516 *et seq.* Platt on Covenants, 304. After conveyance the maxim *caveat emptor* applies, and the purchaser's only remedy for defects of title is under the covenants for title; see *Johnson* v. *Johnson*, 3 Bos. & P. 162, at p. 170, per Lord Alvanley, C. J.

(*m*) See 4 Cruise, Dig. 384. The

Trustees, mortgagees, and other fiduciary vendors, generally covenanted only that they had done no act to incumber their estate or to prevent their granting it.

Implied covenants for title.

It is provided by the Conveyancing and Law of Property Act, 1881 (*n*), that in a conveyance for valuable consideration other than a mortgage, there shall be implied by the person who conveys and is expressed to convey "as beneficial owner," the covenants (qualified as above mentioned) for right to convey, for quiet enjoyment, for freedom from incumbrances, and for further assurance; and that in any conveyance by any person who conveys and is expressed to convey "as trustee," or "as mortgagee," or in other fiduciary character as therein mentioned, a covenant against incumbrances shall be implied (*o*).

III. Lease for lives,

A lease (*p*) may be either for a life or lives, or for years (*q*). Leases of the former class occur but rarely at the present day, and it will be sufficient to remember that, as they confer a freehold interest, they could be created (prior to the Act to Amend the Law of Real Property (8 & 9 Vict. c. 106)) only by an assurance which transferred the seisin either at common law or by the Statute of Uses.

—for years.

Under a lease for years, the lessee, until he makes entry, acquires only an *interesse termini* (*r*), unless the lease operates as a declaration of use, in which case, by virtue of the Statute of Uses, the term vests in him by the execution of the lease. Where a term of years is granted by a person who is himself only a termor, and the term granted equals or exceeds in duration the term held by the lessor, the underlease operates as an assignment of that term (*s*); and conversely, if the assurance purports to be

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theory is that a vendor's covenants should extend to the acts of himself and his predecessors in title up to and including the last purchaser for value, who himself in the ordinary course obtained similar covenants from his own vendor. A purchaser, it is assumed, takes the benefit of all covenants for title entered into by previous vendors, so that there is no one in the chain of title against whose acts there is not a covenant. See an elaborate work on "Covenants for Title," by an American writer, Mr. W. H. Rawle (at pp. 30 *et seq.*); and Dart, V. & P. 616; 4 Bythew. & Jarm., by Robbins, 215.

(*n*) 44 & 45 Vict. c. 41, s. 7.

(*o*) S. 7 (1), (A. and F.). The character in which the conveyancing party acts, viz., "as beneficial owner," &c., must be expressed.

(*p*) Elph. Introd. 208; 4 Cruise, Dig. 54; 1 K. & E. 714; 5 Dav. pt. 2; 3 Robbins' Bythewood.

(*q*) Litt. s. 57.

(*r*) *Ante*, p. 150.

(*s*) 2 Prest. Abst. 5; 2 Prest. Conv. 124; Elph. Introd. 250; *Beardman* v. *Wilson*, L. R. 4 C. P. 57, and *ante*, p. 172 (note (*z*)).

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an assignment, and a term less than the term held by the assignor is granted, the assignment will operate as an underlease.

Leases —operative words.

The operative words of a lease, usually though not necessarily employed, were formerly "demise, grant, and to farm let"—*demisi concessi et ad firmam tradidi.*" The word "demise" only is now commonly used. The expression "to farm let" is thus explained by Blackstone (*u*) :—

"'Farm' or *feorme*, is an old Saxon word signifying provisions : and it came to be used instead of rent or render, because anciently the greater part of rents were reserved in provisions ; in corn, in poultry, and the like ; till the use of money became more frequent. So that a farmer, *firmarius*, was one who held his lands upon payment of a rent or *feorme :* though at present from a gradual departure of the original sense, the word 'farm' is brought to signify the very estate or lands so held upon farm or rent (*x*)."

Covenants for Title in Lease.

We have spoken of the express covenants by the lessee usually inserted in a lease (*y*). By the demise two covenants by the lessor with the lessee are implied, one a covenant that the lessor has power to create the term, and the other for quiet enjoyment during such part of the term as elapses while the lessor's interest continues, unless the lease contains, as is usual, an express covenant for quiet enjoyment, limited to interruption by the lessor or any person claiming through him (*z*).

Title to reversion on lease.

By the Vendor and Purchaser Act, 1874 (*a*), under a contract to grant or assign a term of years, whether out of a freehold or leasehold estate, the intended lessee is not entitled to call for the title to the freehold. And under contracts since 1881, by the Conveyancing and Law of Property Act, 1881, if and as far as a contrary intention is not expressed in the contract, the purchaser of an underlease cannot call for the title to the leasehold reversion ; and, on a contract to grant a lease for a term out of a leasehold interest with a leasehold reversion, the intended lessee has no right to call for the title to that reversion (*b*).

(*u*) 2 Bl. 318.

(*x*) See Elph. N. & C. Interp. 574, *s.v.* Farm.

(*y*) *Ante*, pp. 163 *et seq.*

(*z*) Elph. N. & C. Interp. 422, 424 ; Elph. Introd. 242. See *Dennett* v. *Atherton*, L. R. 7 Q. B. 316 ; and that, where there is no express covenant, the implied covenant for quiet enjoyment is limited to breaches occurring during the continuance of the lessor's interest, see *Schwartz* v. *Locket*, 38 W. R. 142.

(*a*) 37 & 38 Vict. c. 78, s. 2. This does not affect the rule that a lessee has constructive notice of his lessor's title : *Patman* v. *Harland*, 17 Ch. D. 353.

(*b*) 44 & 45 Vict. c. 41, s. 13. And see Conveyancing Act, 1882 (45 & 46 Vict. c. 39), s. 4.

IV. Release.

A Release has been defined to be:—

"The conveyance of a man's interest or right which he hath to a thing to another who hath possession thereof, or some estate therein" (c).

By deed.

Such release "must of necessity," says Lord Coke (d), "be by deed."

When the estate of the person wishing to convey is in remainder or reversion, a feoffment would be inapplicable, for as he has no possession he cannot make livery. Thus, suppose A. to be tenant for life or for years, with remainder to B. in fee; if B. desires to give up his estate to A., this can be effected by a release by B. which operates as a conveyance to A. of the fee; and A., instead of remaining tenant only for either life or years as the case might be, would thenceforth become seised in fee. The smaller interest, under the effect of the release, becomes merged or extinguished in the larger. Again, one joint tenant cannot enfeoff the other, for each is in possession of the whole of the land; but he can convey his interest in the land to the other by a release (e). On the other hand, one tenant in common cannot release to his companion, because they have distinct freeholds (f).

Littleton gives the following precedent of a release: "Know all men by these presents, that I, &c., have remised, released, and altogether from me and my heirs quiet claimed to C., &c., all the right, &c.;" or, expressed in Latin, "*remisisse, relaxâsse, et quietum clamâsse,*"—the first and last expressions, he adds, are of the same effect as the second (g), but the only operative word now used is "release."

V. Lease and release.

When land became the subject of frequent transfer, the inconveniences of a personal resort to the spot to accomplish the public livery of seisin, gave rise to devices for avoiding the necessity of so doing. One of these devices consisted of a combination of a Lease and a Release. A Lease operating at common law was made to the person to whom the land was to be conveyed; and after he had entered into possession under his lease a Release was executed to him of the fee. He thus acquired an estate in fee as effectually as if a feoffment had been made to him (h).

(c) Bacon's Abridgment, tit. Release; see 4 Cruise, Dig. 77; Challis, R. P. 331; Elph. Introd. 435; 5 Dav. "Releases"; 2 Sand. Us. 73.

(d) Co. Litt. 264b.

(e) 4 Cruise, Dig 78 (s. 23). *Ante*, pp. 245, 247.

(f) Bacon's Abridgment, tit. Release. *Ante*, p. 254.

(g) Litt. s. 445.

(h) Co. Litt. 270a; Y. B. 11 Hen. IV. 33, pl. 61; 31 Assis. pl. 25; 47 Ed. III.

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Bargain and sale.

Blackstone (*i*) says that a Bargain and Sale (*j*)—

"Is a kind of real contract, whereby the bargainor for some pecuniary consideration, bargains and sells, that is, contracts to convey the land to the bargainee; and becomes by such bargain a trustee for, or seised to the use of, the bargainee; and then the Statute of Uses completes the purchase: or, as it has been well expressed, the bargain first vests the use, and then the statute vests the possession. But as it was foreseen that conveyances, thus made, would want all those benefits of notoriety, which the old common law assurances were calculated to give; to prevent therefore clandestine conveyances of freeholds, it was enacted in the same session of Parliament, by statute 27 Hen. VIII. c. 16, that such bargains and sales should not enure to pass a freehold, unless the same be made by indenture, and enrolled within six months in one of the Courts of Westminster-Hall, or with the *custos rotulorum* of the county."

Statute of Enrolments.

Bargain and sale for year, followed by release.

In order to avoid the publicity which the enrolment gave to conveyances, the ingenuity of lawyers with the aid of the Statute of Uses, invented a modification of the old common law conveyance of Lease and Release (*k*).

A Bargain and Sale for a term of years did not require enrolment, for the Statute of Enrolments (27 Hen. VIII. c. 16) spoke only of estates of inheritance or freehold; and, as we have seen, by virtue of the Statute of Uses, it vested in the bargainee an estate in possession, on which a release, therefore, could operate, so that there was no necessity for the actual entry by the lessee which was required under the earlier form of conveyance by Lease and Release. The device, therefore, resorted to in order to get rid of the inconveniences of the Statute of Enrolments, and also of the necessity of actual entry to perfect the lease, was simply to make a bargain and sale (*l*) for a short term, generally a year, for a nominal pecuniary consideration, under which the bargainee stood in the position of the lessee under the common law lease after entry, and his estate was by reason of his possession capable of enlargement by the operation of a release; which was given by a contemporaneous deed, generally dated the following day (*m*). Thus, supposing A., being

pl. 76. See, as to this mode of conveyance, 2 Sand. Us. 74; 4 Cruise, Dig. 113; Wms. R. P. 210.

(*i*) 2 Bl. 338.

(*j*) Elph. Introd. 25; 4 Cruise, Dig. 97; 3 Jarman, Bythewood, 216; 2 Sand. Us. 53.

(*k*) Elph. Introd. 25; 4 Cruise, Dig. 113; Challis, R. P. 82, 306; see the form, 2 Bl. App. ii., and Wms. R. P., Appendix D.

(*l*) Which after the Statute of Frauds must be in writing, no rent being reserved, and was usually by deed.

(*m*) 2 Bl. 339. See as to this form of conveyance, 2 Sand., Us. 75; Wms., R. P. 214.

seised in fee simple, wished to convey an estate in fee simple to B., he could by one deed bargain and sell to B. for a pecuniary consideration (*n*), a lease for a year of the land, and by another deed, dated following day, release to B. in fee; and B. would thus become seised in fee. It may be added that uses, which would be executed by the Statute, could be declared on the seisin of the releasee (*o*). This form of conveyance is commonly said to be by Lease and Release; but it is more properly described as a Bargain and Sale for a year, followed by a Release.

Before 4 & 5 Vict. c. 21, two deeds.

Originally there were two distinct deeds, the Lease (Bargain and Sale) and the Release, and it was the practice to recite the former in the latter, and to state the property to be in the actual possession of the releasee by the double operation of the Lease and the Statute for transferring uses into possession (*p*). In process of time, however, it was felt that the lease was a mere matter of form, and it was ultimately dispensed with under an Act of the present reign, intituled, An Act for rendering a Release as effectual for a Conveyance of Freehold Estates, as a Lease and Release between the same parties (*q*). The Act declared that every instrument purporting to be a Release, and expressed to be made in pursuance of the Act, should be as effectual as if a bargain and sale, or lease for a year, had been executed, although not executed in fact.

Superseded: 8 & 9 Vict. c. 106.

Finally, the Act for the Amendment of the Law of Real Property (*r*), superseded the principle of the conveyance by Lease and Release by abolishing the distinction between estates lying in livery and those lying in grant—in other words, between estates in possession and estates in remainder or reversion, and enacting that thenceforth all corporeal hereditaments should, as regards the conveyance of the immediate freehold (*i.e.*, a freehold estate in possession) thereof, be deemed to lie in grant as well as in livery. The result of this statute has been the disuse of conveyances by lease and release, or by release under the statute 4 & 5 Vict. c. 21, and practically all deeds of conveyance have become deeds of Grant. But a bargain and sale of freeholds will still operate under the Statute of Uses if enrolled within six months after its date (*s*).

(*n*) Which might be nominal (2 Sanders on Uses, 57).

(*o*) 2 Sand., Us. 76.

(*p*) See form in 2 Bl. Comm., Appendix.

(*q*) 4 & 5 Vict. c. 21 (repealed by Statute Law Revision Act, 1872, No. 2). See 2 Sand., Us. 85, note.

(*r*) 8 & 9 Vict. c. 106, s. 2.

(*s*) 2 Da. i. 179. Until lately it was sometimes used in practice; Elph. Introd. 83.

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Word "grant."

It has, since the above Act, been the practice to use the word "grant" as the operative word in a conveyance of freeholds, but probably the use of that word was never necessary, and it has, as already stated, been declared by the Conveyancing and Law of Property Act, 1881 (*t*), that the use of the word "grant" is not necessary in order to convey tenements or hereditaments, corporeal or incorporeal, whether the conveyance be before or after the Act.

The only conveyances in use at the present day for the conveyance of freeholds in possession are deeds of grant, bargains and sales (at common law) by executors (*u*), conveyances under a statutory authority such as a conveyance by a tenant for life under the Settled Land Act, 1882 (*x*), and conveyances operating as appointments of a use (*y*). Bargains and Sales enrolled, covenants to stand seised, and feoffments, may still be used, but in practice are obsolete.

VI. Conveyance of leaseholds.

In writing.

The instrument of conveyance of leaseholds or terms of years which, by the Statute of Frauds (*z*), was required to be in writing, is properly an Assignment; but the words "conveyance" and "convey" are popularly used in regard to assurances generally, whether of freehold or leasehold. By the Act to Amend the Law of Real Property (*a*), an assignment of a chattel interest, not being copyhold, in any tenements or hereditaments, made after 1st October, 1845, is void at law unless made by deed.

By deed.

Covenants for Title.

As in a conveyance of freeholds, so in an assignment of leaseholds, it has been customary to insert in the deed covenants for title by the assignor—namely, that the lease is good, that the rents and covenants have been paid and observed, for right to assign, for quiet enjoyment, freedom from incumbrances, and for further assurance. On the other hand, the assignee covenants to pay the rent and perform the covenants, and to indemnify the assignor in respect thereof (*b*). We have seen (*c*) how far the covenants by the assignor may now be implied under the Conveyancing and Law of Property Act, 1881 (*d*).

(*t*) 44 & 45 Vict. c. 41, s. 49. *Ante*, pp. 83, 355.

(*u*) *Ante*, pp. 288, 289.

(*x*) *Ante*, p. 48.

(*y*) *Ante*, p. 289.

(*z*) 29 Car. II. c. 3, s. 3. *Ante*, p. 142.

(*a*) 8 & 9 Vict. c. 106, s. 3. *Ante*, p. 83. As to assignment of chattels real belonging to a married woman (and not her separate estate), see 2 Da. i. 219; Dart's V. & P. 577.

(*b*) See form, 2 Da. i. 419.

(*c*) *Ante*, p. 163.

(*d*) 44 & 45 Vict. c. 41, s. 7, (1) (B.) & (D.).

Transmutation of Possession.

Assurances of freeholds may be divided into two classes:— *First*, where the legal estate passes at common law, or by the operation of some statute other than the Statute of Uses; and *second*, where the assurance operates as the declaration of a use only, so that the purchaser takes the legal estate by the operation of the Statute of Uses. Assurances of the former class are said to operate by "transmutation of possession," or more properly "transmutation of seisin," but we use the former phrase, as it is commonly used. The practical distinction between conveyances of the two classes arises when uses are declared on the seisin of the purchaser (*e*); for, if the conveyance is of the former class the person in whose favour the uses are declared takes the legal estate by the effect of the Statute of Uses, but if the conveyance is of the latter class the legal estate remains in the purchaser, and the person in whose favour the uses are declared takes an equitable estate only.

The phrase "transmutation of possession" is not very happy, for as we shall proceed to show, some of the conveyances which are said to operate by transmutation of possession really effect no change of seisin or even of possession, either because the conveyance is made to a person already in seisin or possession, or because it merely confers the legal estate on the purchaser, and so gives him a right to go into possession without actually putting him into possession, or because it confers only a reversionary legal estate. In fact, when at the present day we say that a conveyance operates by transmutation of possession, all that we mean is that it confers the legal estate without the aid of the Statute of Uses. Probably the expression took its origin from the fact that the ordinary assurance employed at common law to convey or create a freehold interest, *viz.*, a feoffment, derived its efficacy from livery of seisin, so that to transfer the seisin and to confer the legal estate became synonymous phrases.

The principal assurances operating by transmutation of possession which are found in abstracts may be divided into four classes:—

First, where both the seisin and possession are changed. This is the case in a feoffment, in which case livery is made to the purchaser by the person in possession of the land, and in a fine

(*e*) "Purchaser" is here used in its technical sense, as the person to whom the land is conveyed, whether for value or not.

Chap. XIV. or recovery, in which cases livery was made, in theory at least, by the sheriff (*f*).

Second, where the purchaser already has possession or seisin, so that no livery can be made to him. In this case he is capable of acquiring the fee by a release. For example, if A. makes a common law lease to B., and B. enters, A. can subsequently release the fee simple to B., and on this being done, B. becomes seised in fee simple; his term becomes merged in the fee, and his possession is changed into seisin (*ff*). If the release is made before B.'s entry, it is void at common law, though at the present day it would take effect as a statutory deed of grant. In like manner, if B. is seised as tenant for life in possession, and A. is entitled in fee simple in remainder or reversion, A. can release to B., who thus becomes seised in fee simple, and his estate for life becomes merged in the fee. In this case B. was seised of a legal estate before the release was made, and the effect of the release is not to change B.'s seisin, but only to enlarge his estate.

In the case of joint tenancy, as before mentioned (*g*), each joint tenant has seisin of the whole. Therefore a release by one joint tenant to the other does not change the seisin of the latter, but only changes the nature of his estate.

Third, where the conveyance only confers the legal estate and right to the seisin on the purchaser, leaving him to acquire actual seisin by entry. A person who is deemed to be in possession by virtue of a conveyance operating under the Statute of Uses can take a release without having actually entered. For example, if A., seised in fee simple, bargains and sells his land for a term to B. for pecuniary consideration, a use arises in favour of B., and by the effect of the statute he is deemed to be in possession; and, whether he actually enters or not, A. can release the fee to him, and on the release being made B. acquires the legal estate in fee simple. This is the conveyance known as a lease and release (*h*). So, bargains and sales (at common law) by executors (*hh*), and conveyances which operate by virtue of a statute, such, for instance, as a deed of grant, so far as it operates to convey freeholds in posses-

Bargain and sale.

(*f*) As to fines, see 5 Cruise, Dig. 93; and *ante*, pp. 65 *et seq.* As to recoveries, see the form 2 Bl. App. xvii.; and *ante*, pp. 63 *et seq.*

(*ff*) "Poterit etiam quis terram alicui concedere ad terminum annorum, et ille eandem infra terminum illum alteri dare, vel eidem, in feodo, *et sic mutare unam possessionem in aliam, si firmarium feoffaverit;*" Bracton, lib. ii., cap. 9, fol. 27, cited in Digby, R. P. 145.

(*g*) *Ante*, p. 245.

(*h*) *Ante*, p. 360.

(*hh*) *Ante*, pp. 288, 289.

sion, are conveyances of this class. It should be noticed that a conveyance by a tenant for life under the Settled Land Act, 1882, may apparently operate either by transmutation of possession or as a declaration of uses, as may be necessary. In practice such conveyances are always framed so as to operate by transmutation of possession. There is much theoretical difficulty in seeing how uses can take effect, where the land is in the possession of the vendor, before the entry on the land of the person who takes the legal fee, *i.e.*, the grantee to uses, under a conveyance of the class now being considered, for he can hardly be said to be seised before he has actually acquired possession. If uses exhausting the whole fee are declared on the seisin of the grantee, he is never intended to enter, and perhaps it may be held that the entry of the *cestui que use*, which is only lawful on the supposition that the grantee to uses was seised, operates so as to confer an instantaneous seisin on the grantee to uses out of which all the uses as they arise are fed.

Fourth, where the conveyance confers the legal estate on the purchaser, and either confers the immediate seisin without the right to possess, or does not even confer the immediate seisin.

There are two cases:—*First*, where the land is in the possession of a tenant for years; *second*, where a tenant for life, or a tenant in tail, is seised of the land. In either case the fee simple in remainder or reversion can and always could be passed by a deed of grant though, before the Statute of Anne (*i*), the purchaser did not acquire seisin of the reversionary fee until the tenant attorned. It will be observed that in the first of these cases the purchaser acquires seisin without possession, and in the latter case he does not acquire either possession or immediate seisin. All that he acquires is seisin of the reversionary fee simple. The difficulty in understanding the meaning of transmutation of seisin arises from the change in meaning of the word seisin. Originally it meant the actual possession of a freeholder; now it means "having the legal estate, either in possession or remainder or reversion," provided that it has not been turned into a mere right of entry, as where a wrongdoer has obtained actual possession.

(*a*) Valuable Consideration (*k*).

The motive which induces a person to enter into a contract or make an assurance is called "valuable consideration" where it

(*i*) See *ante*, p. 162.

(*k*) See Pollock. on Contract, ch. iv. (5th ed.), p. 166.

Chap. XIV. is either (1), an intended marriage; (2), some right, interest, profit, or benefit, accruing to him or, at his request, to a stranger; or (3), some forbearance, detriment, loss, or responsibility, given, suffered, or undertaken by the other party to the contract or assurance.

A few examples will render this more clear.

A., in consideration of an intended marriage between B. and C., covenants with D. to pay him a sum of money if the marriage takes place. A., in consideration of £100 paid to him, conveys a field to B. A. agrees with B. to give up a right of way over B.'s field, on having another right of way conveyed to him; or that he will pay £100 to B., if he goes to Paris; or, if he will become surety for A. In each of these cases, A. is said to agree or convey for "valuable consideration," or, shortly, "for value."

Where the consideration is some act or forbearance done or suffered at the date of the conveyance, it is said to be "executed"; where it consists of a covenant to do, or abstain from doing, something, in the future, it is said to be "executory."

(b) "Good consideration."

The motive which causes a man to enter into a contract or make an assurance is called "good consideration" where it is the affection that he bears towards a blood relation, or towards the husband or wife or intended husband or wife of a blood relation.

If a man enters into a contract, or makes an assurance, from any motive other than valuable or good consideration, he is said to act "without consideration." An assurance not made for valuable consideration is called "voluntary (*kk*)."

Persons who claim under a voluntary assurance are called "volunteers."

It should be noted that, though no consideration appear on the face of a conveyance, evidence is admissible to prove that there was in fact consideration for the conveyance (*l*).

Part II.—*Involuntary Alienation.*

Forfeiture on Attainder (*m*).

As the law stood immediately before the 4th of July, 1870, the day on which the Act of 33 and 34 Vict. c. 23 received the royal assent, a tenant in fee simple on attainder (*n*) of high treason

(*kk*) See *ante*, p. 104, as to voluntary settlements.

(*l*) See Elph. N. & C. Interp. 145 (Rule 39), citing (*inter alia*), Shep. T. 510; *Townend* v. *Toker*, L. R. 1 Ch. 459.

(*m*) See Chitty, Prerog. 216; 4 Jarman, Conv. by Sweet, 3rd edit., s.v. *Forfeiture*, Tud. L. C. R. P. note to *A. G.* v. *Sands*, p. 785.

(*n*) *I.e.*, judgment and sentence of

forfeited his land to the Crown absolutely; on attainder of felony, he forfeited his land to the Crown for a year and a day, during which period the Crown could commit all manner of waste (*o*), and after the expiration of that period, in cases of murder (*p*), it escheated to the lord of whom it was held, on account of the corruption of blood produced by the attainder. On the attainder of high treason of a tenant in tail in possession, or entitled to a right of entry, his estate tail was forfeited to the Crown, which acquired the land during the life of the tenant in tail and during the existence of any heirs of the person attainted who would have been capable of inheriting the estate tail if there had been no attainder (*q*).

By attainder of a tenant in tail for felony, the estate tail was forfeited during the life of the tenant in tail, or during the year and day, whichever period was the longer.

By conviction (*r*), even without attainder, of high treason or felony the offender forfeited his chattels both real and personal, and on attainder he forfeited the profits of his estates for life of every nature.

On attainder of a copyholder his estate was forfeited to the lord, not to the Crown (*s*).

Outlawry.

Outlawry was a process to force a person accused of a crime, or the defendant in a civil action, to appear. In case of outlawry for treason or felony the law interprets the absence of the accused as sufficient evidence of his guilt, with the consequences of corruption of blood and forfeiture. In other cases the profits of the outlaw's lands, while the outlawry remained in force, and his goods and chattels were forfeited to the Crown (*t*). The outlawry of a copyholder appears to create no forfeiture except for a capital crime (*u*).

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death. Attainder must be carefully distinguished from conviction, which is where a man is outlawed, or appears and confesses, or is found guilty by the inquest. And it should be observed that there is no attainder until judgment; mere conviction does not cause attainder; see Co. Litt. 390*b*; and 4 Bl. 380, 381, where it is remarked that the difference between a man *convicted* and a man attainted was frequently overlooked. (The note in Tud. L. C. R. P. 785, to *A.-G.* v. *Sands*, is inaccurate in this respect).

(*o*) 2 Instit. 37.

(*p*) 54 Geo. III. c. 145.

(*q*) 1 Cruise, 90, where the earlier law is stated.

(*r*) Co. Litt. 391*a*.

(*s*) Scriven on Copyholds, 6th ed. 180.

(*t*) *The Queen* v. *Simpson*, 10 Mod. 378, *per* Parker, C. J.

(*u*) See Scriven on Copyholds, 6th ed. 183, note (*s*).

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33 & 34 Vict. c. 23.

The Act to abolish Forfeitures for Treason and Felony (*x*) provides that:—

> S. 1. "From and after the passing of this Act, no confession, verdict, inquest, conviction, or judgment of or for any treason or felony or felo de se shall cause any attainder or corruption of blood, or any forfeiture or escheat; provided that nothing in this Act shall affect the law of forfeiture consequent upon outlawry."

Outlawry in civil proceedings, which had become obsolete, was abolished as from the 15th August, 1879, by the Civil Procedure Acts Repeal Act, 1879 (*y*). The result is that at the present day the only case in which outlawry can affect any interest in property is that of a person being outlawed on criminal process.

Execution.

Where a man obtains judgment in the Supreme Court (*z*) to recover a sum of money he can enforce it against the property of his debtor by execution.

Execution in ordinary cases is effected by a writ of *Fieri Facias*, or by a writ of Elegit, or by the appointment of a Receiver (*a*).

Writ.

A writ is a command given by the Queen under seal to a person to do or abstain from doing something. Thus a peer is commanded by the Queen to attend Parliament by a writ of summons under the Paper Seal, now substituted in certain cases for the Great Seal (*b*). An action at the present day, commences with a writ of summons, which is a command from the Queen, under the seal of the Supreme Court, to the defendant "to cause an appearance to be entered for you in an action at the suit of A. B." (*c*). Formerly there were a great many different forms of writs by which actions could be commenced, and such writs were called "writs original," as distinguished from "writs judicial" (*d*), which were writs issued during the progress or at the end of an action.

Fi. Fa. (*e*).

The writ of *Fieri Facias*, commonly called *fi. fa.*, is a remedy

(*x*) 33 & 34 Vict. c. 23.

(*y*) 42 & 43 Vict. c. 59, s. 3.

(*z*) We do not intend to discuss the methods of enforcing judgments of inferior courts. "A judgment of the Supreme Court" in the text includes judgments and orders of all divisions of the High Court, including those made in the Bankruptcy jurisdiction. Elph. & Cl. on Searches, 25.

(*a*) See for a full account of these and other methods of execution, Anderson on the Law of Execution; Edwards on Executions.

(*b*) See the Crown Office Act, 1877 (40 & 41 Vict. c. 41), s. 4.

(*c*) See forms in R. S. C., Appendix A), part i.

(*d*) Co. Litt. 73 *b*. *Jehu Webb's Case*, 8 Rep. at 48*a*.

(*e*) Elph. & Cl. on Searches, 68; see form of *fi. fa.* in R. S. C., Appendix (H), No. 1.

given to a judgment creditor at common law. It is a writ addressed to the sheriff, by virtue of which he seizes the goods and chattels of the judgment debtor and sells them, and in practice applies the proceeds in payment to the judgment creditor of the amount due to him, instead of paying them into Court as directed by the writ.

Under a *fi. fa.*, the sheriff can sell the debtor's legal term of years, but probably not his equitable interest in it. He has no power to enter into the debtor's land, and he cannot give possession of the land to the purchaser, who is left to obtain it by an action to recover possession of the land. As against the debtor himself, the term is bound from the *teste* (*i.e.*, date) of the writ, but after the Statute of Frauds (*f*) it was not bound as against strangers till the writ was delivered to the sheriff; and now, by virtue of the Mercantile Law Amendment Act (*g*), the writ does not prejudice a title to the land where before actual seizure such title is acquired by a *bonâ fide* purchaser for value without actual notice before he purchased that the writ had been delivered to the sheriff.

Elegit (*h*).

The writ of *Elegit* is a remedy which was originally given to the judgment creditor by the Statute of Westminster 2nd (*i*), but which has been greatly modified by modern legislation (*k*). In its present form it is a command from the Queen to the sheriff directing him to deliver to the judgment creditor all the lands of the judgment debtor, to hold the same until the amount of his debt with interest shall be levied. On the receipt of the writ the sheriff, acting throughout by his under-sheriff, holds an inquiry, called an Inquisition, before a jury, for the purpose of ascertaining what lands in his bailiwick belong to the debtor, what estate he has in them, and their annual value, called the "extended value." This proceeding is entirely *ex parte*; no notice of it is given to the debtor, and nothing is done on the land itself. When the inquisition is complete, a formal statement of the proceedings under it is drawn up and sealed by the sheriff and the jurors. The sheriff then makes up and signs a formal statement of all that he has done in obedience to the writ, which statement,

(*f*) 29 Car. II. c. 3, s. 16.

(*g*) 19 & 20 Vict. c. 97.

(*h*) Elph. & Cl. Searches, 62; see form in R. S. C., Appendix (H), No. 3.

(*i*) 13 Ed. I. c. 18. See 2nd Instit. 39.

(*k*) 1 & 2 Vict. c. 110; The Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 146. See the history of the writ in Wms., R. P. 104.

Chap. XIV. when signed, is called the "return to the writ"; and he afterwards sends the writ and the return to the writ to the Supreme Court. This final act is sometimes called the "return of the writ." The return *to* the writ must be carefully distinguished from the return *of* the writ; the difference between them is the same as the difference between writing a letter and posting it.

The instant that the return to the writ is made, the lands comprised in it are said to be "delivered in execution" to the execution creditor: the effect of this is to confer on him a legal right of entry, which he can enforce against the execution debtor by an action to recover possession, or by actual entry without an action if his entry is not opposed, and by virtue of which, if the land is in the occupation of tenants of the execution debtor, he can distrain upon the tenants for rent becoming due after the land is delivered in execution.

The execution creditor who obtains possession or receipt of the rents and profits is said to be *Tenant by Elegit;* he has a chattel interest which he may hold till his debt with interest is satisfied out of the rents and profits (*l*).

Under an *Elegit* all land can be seized in which the debtor has a legal estate in possession (as opposed to remainder), or subject only to a term of years or to an equitable mortgage; or the entire equitable fee; or a legal term of years, or a copyhold estate, or land over which he has a disposing power (*m*) which he can without the consent of any other person exercise for his own benefit.

Receiver (*n*). A Receiver is a person appointed by the Court to receive the rents and profits or income of specified property, whether real, chattel real or chattel personal, or of any legal or equitable interest therein.

By the Supreme Court of Judicature Act, 1873 (*o*), the Court may appoint a Receiver "in all cases in which it shall appear to the Court to be just or convenient that such order should be made." A somewhat wide construction has been placed on this provision; and, in practice, in all cases where a judgment creditor cannot have the debtor's lands delivered to him under an *elegit*, he can obtain the appointment of a Receiver of the rents

(*l*) Co. Litt. 43*b*; 2 Cruise, Dig. 54; Anderson on Executions, 396.

(*m*) As to whether this includes the power of a tenant in tail to bar the remainderman, see Elph. & Cl., Searches, 20.

(*n*) Elph. & Cl., Searches, 71; *Wills* v. *Luff*, 38 Ch. D. 200; and *Re Shephard*, 43 Ch. D. 131.

(*o*) 36 & 37 Vict. c. 66, s. 25.

and profits (*p*). The Receiver, when appointed, has to give security, and has to pay all moneys received by him into Court; and from time to time the moneys, after providing for costs and the Receiver's remuneration, are paid to the execution creditor towards satisfaction of his debt. The appointment of a receiver operates as "actual delivery in execution" under 27 & 28 Vict. c. 112, and as completed execution under the Bankruptcy Act, 1883, s. 45 (*q*).

Lien in Equity (*r*).

By the effect of 1 & 2 Vict. c. 110, s. 13; 23 & 24 Vict. c. 38; and 27 & 28 Vict. c. 112, an execution creditor who has obtained "actual delivery in execution," *i.e.*, by the return to the writ of *Elegit*, or by the appointment of a Receiver of his debtor's land, acquires a charge in equity on the land for the amount of his debt and interest, with the same remedies as if the debtor had agreed in writing to charge the land with the amount of the debt and interest. This charge only remains in force for three calendar months. The law with respect to it may be considered obsolete, as the creditor will in practice rely on his right to sell the land under 27 & 28 Vict. c. 112, s. 4, which provides that an execution creditor to whom the land of his debtor has been "actually delivered in execution" and whose writ or process of execution (*t*) has been duly registered (now in the Central Office), according to the Act, may, while the registration remains in force, obtain from the Court of Chancery (now the Chancery Division) upon petition, an order for the sale of his debtor's land. The proceeds of sale are to be divided among the persons who may be found entitled thereto according to their priorities.

Sale on Petition (*s*).

It will be observed that the proceedings under an *Elegit* or on the appointment of a Receiver do not require anything to be done on the land itself, and do not require registration, unless for the purpose of obtaining a sale by the Court. The result is, that an intending purchaser of land had formerly no means of ascertaining whether land had been delivered in execution, and ran the risk of taking his conveyance, paying his purchase-money, and then discovering that the land had been delivered in execution to a creditor. This actually happened in the case of *Re Pope* (*u*), and it was held that the purchaser, although he had acquired the

(*p*) See, however, R. S. C., Ord. 50, rule 15*a*.

(*q*) See *post*, p. 374.

(*r*) Elph. & Cl., Searches, 38.

(*s*) Elph. & Cl., Searches, 39.

(*t*) The order appointing a receiver is a "process of execution."

(*u*) 17 Q. B. D. 743; Elph. & Cl., Searches, 40.

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Land Charges Registration Searches Act, 1888.

legal estate, was postponed to the creditor. In order to obviate this inconvenience, the Land Charges Registration and Searches Act, 1888 (*x*), was passed. This Act provides that:—

(S. 5) (1) "There shall be established and kept at the office of Land Registry a register of writs and orders affecting land, and there may be registered therein, in the prescribed manner, any writ or order affecting land issued or made by any court for the purpose of enforcing a judgment, statute, or recognizance, and any order appointing a receiver or sequestrator (*y*) of land.

(2) "Every entry made in pursuance of this section shall be made in the name of the person whose land is affected by the writ or order registered.

(3) "The registration of a writ or order in pursuance of this Act shall cease to have effect at the expiration of five years from the date of the registration, but may be renewed from time to time, and, if renewed, shall have effect for five years from the date of the renewal.

(4) "Registration of a writ or order in pursuance of this section shall have the same effect as, and make unnecessary, registration thereof in the Central Office of the Supreme Court of Judicature in pursuance of any other Act.

(S. 6) "Every such writ and order as is mentioned in section five and every delivery in execution or other proceeding taken in pursuance of any such writ or order, or in obedience thereto, shall be void as against a purchaser for value of the land unless the writ or order is for the time being registered in pursuance of this Act.

"Provided that—

"(a) Where the writ or order is at the commencement of this Act registered in pursuance of the Act of the session held in the twenty-seventh and twenty-eighth years of Her Majesty, chapter one hundred and twelve, intituled 'An Act to amend the law relating to future judgments, statutes, and recognizances,' nothing in this section shall affect the operation of such writ or order until the expiry of the period for which it is so registered;

"(b) Where the proceeding in which the writ or order was issued or made is for the time being registered as a *lis pendens* in the name of the person whose land is affected by the writ or order, nothing in this section shall affect the operation of such registration."

It will be observed that the Act does not alter the law as between the execution creditor on the one part and the execution debtor, or volunteers claiming under him, or other execution creditors, on the other part; but only as between an execution creditor and purchasers for value (including mortgagees) claiming under the execution debtor. In order that the rights of

(*x*) 51 & 52 Vict. c. 51. See Elph. & Cl. on this Act.

(*y*) As to sequestration, see Elph. & Cl., Searches, 74.

the execution creditor may prevail over those of the purchaser for value, it is necessary that both delivery in execution and registration of the writ, or other process of execution, should take place before completion of the purchase.

The registration of executions under 27 & 28 Vict. c. 112 can be ascertained by searching the register which is kept at the Central Office, and the registration of executions under the Land Charges Registration and Searches Act, 1888, by searching the register which is kept at the Land Registry Office. Provision is made for an official search, in the former case by the Conveyancing Act, 1882 (*z*), in the latter case by the Land Charges Registration and Searches Act, 1888 (*a*).

By 53 & 54 Vict. c. 69 (s. 19), the registration of a writ or order affecting land may be vacated by an order of the High Court, or any judge thereof.

Bankruptcy(*b*).

Bankruptcy is discussed in the Author's Treatise on the Law of Personal Property. It suffices in this place to state that, on a debtor being adjudicated bankrupt, all the property (including the right to exercise powers over property that he could exercise for his own benefit) which belonged to him at the commencement of the bankruptcy, and any property acquired by him before his discharge, with some exceptions not necessary to be discussed in this place (*c*), vest in the trustee in bankruptcy (*d*).

"Property," as defined by the Bankruptcy Act, 1883 (*e*), includes "land, and every description of property, whether real or personal," "also easements, and every description of estate interest and profit, present or future, vested or contingent, arising out of or incident to property."

The trustee in bankruptcy is authorized (*inter alia*) to deal with any property to which the bankrupt is beneficially entitled as tenant in tail in the same manner as the bankrupt might have dealt with it (*f*).

It is provided (*g*) that an execution creditor "shall not be entitled to retain the benefit of the execution against the trustee in bankruptcy of the debtor unless he has completed the execution before the date of the receiving order and before notice of the pre-

(*z*) 45 & 46 Vict. c. 39, s. 2.

(*a*) 51 & 52 Vict. c. 51, s. 17.

(*b*) See a concise account of the repealed Acts in Elph. & Cl. on Searches, 96.

(*c*) The Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 44.

(*d*) *Ib.* s. 68.

(*e*) *Ib.* 168.

(*f*) *Ib.* s. 56 (5).

(*g*) *Ib.* s. 45.

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sentation of any bankruptcy petition by or against the debtor, or of the commission of any available act of bankruptcy by the debtor."

Within the meaning of this provision execution under a *fi. fa.* (*h*) is "completed" by the sale by the sheriff. Execution under an elegit (*i*) is completed by the return to the writ being made, even if the return of the writ is made after the receiving order; execution under an order appointing a receiver (*k*) is completed by the order being made.

Crown Debts (*l*).

At common law the Crown can issue execution against all the lands, except copyholds and probably customary freeholds, which the debtor had at the time when he appeared by record (*m*) to be indebted to the Crown, and notwithstanding that he has since died or sold the lands. If execution is issued during the life of the debtor, it is called an "extent;" if after his death, a "*diem clausit extremum.*"

Specialty debts due to the Crown payable "*Domino Regi, heredibus vel executoribus suis*" (*n*) from tax-collectors (*o*) and the balances due from army agents at the expiration of one month and after demand of payment (*p*) are deemed debts of record to the Crown.

By the Crown Suits Act, 1865 (*q*), writs can be issued in respect of a debt due to the Crown without previously turning it into a debt of record.

Debts due to the Crown from certain officers or from receivers of "money imprest" (*i.e.*, money issued from the Treasury for the public service) or otherwise for the use of the Crown, commonly called "Accountants to the Crown," bind their land from the time of their entering into office (*r*).

The Crown can seize freeholds whether legal or equitable, lands that the debtor has contracted to sell or has sold, lands over which he has a general power of appointment by deed and leaseholds, but not copyholds.

(*h*) *Christie* v. *Winnington*, 8 Ex. 287; *Hernaman* v. *Bowker*, 11 Ex. 760.

(*i*) *Re Hobson*, 33 Ch. D. 493.

(*k*) *Ex parte Evans*, 13 Ch. D. 252.

(*l*) See Elph. & Cl., Searches, 78; 1 Cruise, Dig. 60. *Re West London Commercial Bank*, 38 Ch. D. 364; *A.-G.* v. *Leonard*, *Ib.* 622.

(*m*) A debt due to the Crown becomes a debt of record by the return to an inquisition taken on a commission to enquire whether the debtor owes any debt to her Majesty; *Rex* v. *Mainwaring*, 2 Price, 67. See Elph. & Cl. on Searches, 79.

(*n*) 33 Hen. VIII. c. 39.

(*o*) 43 Geo. III. c. 99, s. 41.

(*p*) 48 Geo. III. c. 128, s. 3.

(*q*) 28 & 29 Vict. c. 104, s. 47.

(*r*) 13 Eliz. c. 4.

The right of the Crown to seize lands that its debtor had sold was very dangerous to purchasers, and various Acts were passed mitigating this danger. It is now provided, by the Crown Suits Act, 1865 (*s*), that, after the 1st November, 1865, no future Crown debt or acceptance of office by an accountant to the Crown shall affect a *bonâ fide* purchaser or mortgagee, unless a writ or process of execution is issued and registered (now in the Central Office) before the execution of the conveyance or mortgage to him, and the payment of the purchase or mortgage money by him.

The head of the department to which an intending vendor or mortgagor is a debtor or accountant, or the Treasury, or the Commissioners of Customs, as the case may be, can enable the sale or mortgage to be safely carried out (*t*) in the various manners mentioned in the Acts.

(*s*) 28 & 29 Vict. c. 104, s. 48.

(*t*) 16 & 17 Vict. c. 107, ss. 105–107; 18 & 19 Vict. c. 78, s. 6; 19 & 20 Vict. c. 108, s. 76; 23 & 24 Vict. c. 115, s. 1; and 39 & 40 Vict. c. 36, s. 167.

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CHAPTER XV.

WILLS.

I. Will—differing from instruments *inter vivos.*

THE modes of assurance previously considered have been by instruments designed to give effect to some transaction "*inter vivos*," between living parties. There remains to be considered another mode—namely, devise by Will. The former modes of assurance operate immediately upon their completion; but a Will may be revoked down to the very hour of the testator's death, provided mental competency remains; and, as it takes effect only from his death, it operates only on the property which he owns at his death (*a*).

In the strictest technical sense, the terms "will" and "devise" are applied to real estate; and the terms "testament," "bequest," and "legacy," to personal estate; but the terms "will," "testator," and "testamentary," are commonly used with reference to either species of property (*b*).

Codicil.

Besides a will, there is an instrument of testamentary disposition termed a Codicil. Blackstone says (*c*):—

> "A Codicil, *codicillus*, a little book or writing, is a supplement to a will; or an addition made by the testator, and annexed to, and to be taken as part of, a testament: being for its explanation, or alteration, or to make some addition to, or else some subtraction from, the former dispositions of the testator."

A codicil is occasionally written at the foot of and on the same sheet of paper as the will, but it is more generally written on a separate paper. The will and codicil together constitute the expression of the testator's intention, and the codicil is read together with and construed as part of the will itself.

Where a codicil affects the dispositions contained in a will or prior codicil, it is an established rule not to disturb the disposi-

(*a*) In some cases a testator may be able, by exercising a power, to dispose of property that does not belong to him.

(*b*) Hayes & Jarman, Concise Forms of Wills, 70, note; Shep. Touch. 400. As to the meaning of "devise," see Co. Litt. 111*a*; and per Lord Selborne, C., in *Holyland* v. *Lewin*, 26 Ch. D. at p. 271.

(*c*) Vol. ii. 500.

tions of the antecedent instrument further than is absolutely necessary in order to give effect to the subsequent codicil. Thus, where a testatrix, having by her will given her fortune to be divided between R. N. and A. K., by her codicil after reciting the death of A. K. desired her fortune might be divided between R. N. and T. K., "for the use of their children, and when they come of age to have settled upon them"; it was held that, R. N. having died without having had children, the absolute gift to him of a moiety under the will took effect; the original gift was affected only so far as was necessary in order to carry into effect the intention in his children's favour, and therefore, as he never had a child, was not in the result affected at all (*d*).

Codicils, as a rule, are, as pointed out by Mr. Davidson (*e*), objectionable except for simple purposes, such as the gift or revocation of a legacy, or the appointment of trustees or executors; for, independently of the risk of the codicil being lost, there is often much difficulty in fitting the provisions of the codicil into the trusts or limitations of the will. If larger changes are contemplated, a new will should be made.

Several wills.

Where a man leaves more than one will and the last of them contains no express revocation of the former wills, and does not dispose of all the property disposed of by them, all the wills taken together will be considered as "the will" (*f*).

History of devises of land.

Previously to the Statute of Wills (*g*), the owner of lands had no power over them of direct disposition by will, except in some places by custom (*h*); but, while wills were not allowed, the practical power of devising lands was acquired indirectly by feoffments of the lands made to friends under instructions to hold them at the disposal by will or otherwise of the feoffor. And in such cases the will of the feoffor was enforced by the Court of Chancery as a declaration of the use. Thus, through the medium of uses, the power of devising was continually exercised in effect and reality. The Statute of Uses which we have above discussed (*i*), for a short time defeated this device,

(*d*) *Norman* v. *Kynaston*, 3 De G. F. & J. 29; and see 1 Jarm. on Wills, 176.

(*e*) 4 Dav. 593, note.

(*f*) *Lemage* v. *Goodban*, L. R. 1 P. & D. 57.

(*g*) 32 Hen. VIII. c. 1. See as to the history of wills, Hargrave's note (1) to Co. Litt. 111*b*; 6 Cruise, Dig. 1; Digby, R. P. Ch. VIII., p. 333.

(*h*) Co. Litt. 111*a*.

(*i*) *Ante*, Ch. X., p. 258. See the St. of Uses (27 Hen. VIII. c. 10) in Digby, R. P. 303. The statement in the text of the operation of the statute, though sufficient for the present purpose, is imperfect.

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since that statute enacted that where any person or persons stand seised of lands to the use, confidence, or trust of any other person or persons, or body politic, in every such case the person and persons and bodies politic that have the use shall be deemed in lawful seisin and possession of the lands for such estate as they have in the use—in other words, be recognised as the legal owners. The statute by "transferring the uses into possession" made them legal estates, and therefore not devisable. In the same reign, however, after the short interval of five years, the power of devising was partially revived by the statute 32 Hen. VIII. c. 1 (commonly called the Statute of Wills, explained by 34 & 35 H. VIII. c. 5), power being thereby given to every person having "any lands or hereditaments holden in socage or in the nature of socage tenure," to devise them by his last will in writing. By 12 Car. II. c. 24, all the freehold land in the kingdom became socage, and therefore devisable.

Devise formerly passed only land belonging to testator at date of will.

It was held on the construction of the Statute of Wills that every devise of freehold land spoke from the date of the will, and passed only the land then belonging to the testator (*k*), or, in other words, that no freehold land acquired by a testator after the date of his will could pass by it. But the effect of a codicil duly executed so as to pass land, was to make the will speak from the date of the codicil and thus to enable it to pass land acquired between the date of the will and that of the codicil (*l*).

Copyholds.

By the common law copyholds could not be devised, except by virtue of a special custom; and they were not made devisable by the Statute of Wills. If the copyholder of a manor where there was no custom to devise wished to devise his copyhold, he made a surrender to the use of his will. The copyhold passed by the surrender, not by the will, which was regarded as a mere declaration of the uses of the surrender. An equitable interest in copyholds could not be surrendered, and therefore passed by a devise without any surrender to the use of the will (*m*). By 55 Geo. III. c. 192, all devises thereafter made of copyholds, though not surrendered to the use of the testator's will, were rendered as valid as if they had been surrendered to the use of his will. This Act conferred no new testamentary power, but merely supplied the want of a surrender.

(*k*) *Butler and Baker's Case*, 3 Rep. 30*b*; *Buckenham* v. *Cook*, Holt, 248; 6 Cruise, Dig. 31.

(*l*) *Acherley* v. *Vernon*, Com. Rep. 381; *Goodtitle* v. *Meredith*, 2 M. & S. 5.

(*m*) *Allen* v. *Poulton*, 1 Ves. Sen. 121.

But freehold land acquired after the date of the will and copyholds will now pass by a general devise, for the Wills Act (*n*) contains a provision that (*o*) all the real estate of the testator which he shall be entitled to at law or in equity at the time of his death, and which, if left to be disposed of by law, would descend to the heir-at-law, or customary heir, may be disposed of by his will, including copyholds, estates *pur autre vie*, contingent executory or other future interests, and rights of entry for conditions broken and other rights of entry; and notwithstanding he may become entitled to the same subsequently to the execution of his will. And the will is to be construed with reference to the real and personal estate comprised in it, and to take effect as if it had been executed immediately before the death of the testator, unless a contrary intention appear by the will (*p*).

Statute of Frauds.

Before the Statute of Frauds (*q*) a will or codicil might either be in writing, which did not require the signature of the testator, or it might be nuncupative, *i.e.*, made by word of mouth only. That statute, however, provided (*r*) that devises of lands "shall be in writing and signed by the party so devising the same, or by some other person in his presence and by his express directions, and shall be attested and subscribed in the presence of the said devisor by three or four credible witnesses, or else they shall be utterly void and of none effect."

Formalities on execution (1 Vict. c. 26, s. 9.)

It was held that this section did not apply to copyholds, probably on the ground that, as the land passed by the surrender and will together and not by the will alone, the gift of the copyholds was not a devise within the meaning of the Act; and that it did not apply to leaseholds for years. This section was repealed by the Wills Act (*s*), which provided (*t*) that a will, which is defined so as to include codicil (*u*), shall be signed at the foot or end thereof by the testator or other person under his direction, that such signature shall be made or acknowledged by the testator in the presence of two (*x*) or more witnesses present at the same time, and that such witnesses shall attest and subscribe the will in the presence of the testator. The Wills Act Amendment Act,

(*n*) 1 Vict. c. 26, s. 3.

(*o*) As to the execution of a general power of appointment by will, see *ante*, pp. 294, 295.

(*p*) 1 Vict. c. 26, s. 24. See *In re Russell*, 19 Ch. D. 432.

(*q*) 29 Car. II. c. 3.

(*r*) *Ib.* s. 5.

(*s*) 1 Vict. c. 26, s. 2.

(*t*) S. 9.

(*u*) S. 1.

(*x*) Under the Statute of Frauds, at least three were requisite.

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1852 (*y*), explained what was intended by a signature "at the foot or end" of the will.

Attestation.

In a recent case, the witnesses to the execution of a codicil signed their names on the back of the will, to which that codicil was attached by a pin, instead of attesting the signature of the testatrix on the paper itself. Sir James Hannen said:—

"The law does not require that the attestation should be in any particular place, provided that the evidence satisfies the Court that the witnesses in writing their names had the intention of attesting. But the attestation, if not on the same sheet of paper as the signature of the testator, must be on a paper physically connected with that sheet. No particular mode of affixing one piece of paper to another is prescribed by law, and I cannot say that the fastening of two sheets of paper together by a pin is an insufficient mode of connection, or that it is less effectual than the lawyer's mode of fastening by a tape. Here I am satisfied by the evidence that the papers were connected together, and that in writing their names on the back of the original will, the witnesses intended to attest the signature of the testatrix at the foot of the codicil. That codicil, being duly executed, confirms the will in its altered state, and probate will go accordingly" (*z*).

Witnesses. (1 Vict. c. 26, ss 14—17.)

A witness who, or whose wife or husband, takes an interest under the will, is not a credible witness within the meaning of the Statute of Frauds, and therefore attestation by such a witness was formerly inoperative. The statute 25 Geo. II. c. 6, validated the attestation when there was a devise to the attesting witness, but invalidated the devise (*a*). The Wills Act extended the provisions of 25 Geo. II. c. 6 to the wives and husbands of attesting witnesses (*b*).

Where a creditor, or the wife or husband of any creditor, is an attesting witness, the will is not thereby invalidated, although there be a charge of debts by the will in favour of such creditor (*c*); and an executor is not incompetent to prove the execution of a will, or its validity or invalidity (*d*).

Further, a will is not to be invalid by reason of an attesting

(*y*) 15 & 16 Vict. c. 24.

(*z*) *In the Goods of Braddock*, 1 P. D. 433; *In the goods of Streatley* [1891], 1 P. 172. As to the case where the instrument actually executed by the testator comprises his will, but through fraud or inadvertence, contains also something which is not his will, see *Rhodes* v. *Rhodes*, 7 App. Cas. 198; and *Morrell* v. *Morrell*, 7 P. D. 68.

(*a*) See *Emanuel* v. *Constable*, 3 Russ. 436.

(*b*) 1 Vict. c. 26, s. 15. The marriage, after attestation, of a devisee to the attesting witness does not affect the validity of the devise; *Thorpe* v. *Bestwick*, 6 Q. B. D. 311.

(*c*) 1 Vict. c. 26, s. 16.

(*d*) *Ib.*, s. 17.

witness being, at the time of execution or afterwards, incompetent to be admitted as witness to prove the execution (*e*).

Infants.

Before the Wills Act came into operation an infant could not devise his land except by special custom, but a boy of the age of 14 and a girl of the age of 12 could bequeath personal estate (*f*). The Act provides (*g*) that no will made by a person under the age of 21 years shall be valid.

Married women. 1 Vict. c. 26, s. 8.

The Act (*h*) also provides that "no will made by any married woman shall be valid, except such a will as might have been made by a married woman before the passing of this Act." We have therefore to enquire what power of testamentary disposition was vested in a married woman before the Act (*i*).

Where property belonged to her for her separate use, or where she had a power to appoint an equitable interest in property, she could dispose of the equitable, but not the legal, interest by her will. If freeholds were limited to such uses as she should appoint by will, she could by her will appoint the use, and the devisee taking the use under the will acquired the legal estate by the Statute of Uses. But she had no power to devise a legal interest in land (which, it will be remembered, could not vest in her solely during coverture), nor to devise an equitable interest not belonging to her for her separate use.

Though no extension was given to the testamentary power of a married woman by the Wills Act (1 Vict. c. 26), some extended effect and operation was given to her testamentary appointment—namely, by the 24th and 27th sections. By s. 24, the will is to be construed with reference to the real and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the testator's death, unless a contrary intention appear from the will; and by s. 27 it is enacted that a general devise shall be construed to include any real estate which the testator may have power to appoint in any manner he may think proper, and shall operate as an execution of the power unless a contrary intention appear by the will (*k*). The effect of these sections on the execution of a power by the will of a married woman may be seen in the case of *Thomas* v. *Jones* (*l*), where a power of appointment was given to the survivor of three persons,

(*e*) *Ib.* s. 14.
(*f*) 6 Cruise, Dig. 13.
(*g*) 1 Vict. c. 26, s. 7.
(*h*) *Ib.* s. 8.
(*i*) See *ante*, p. 117.
(*k*) *Post*, p. 394.
(*l*) 1 D. J. & S. 63 (at p. 80).

David, John and Margaretta. After the death of John, but while David was living, Margaretta, being then under coverture, made her will. She survived David and died in the lifetime of her husband without having republished her will. Lord Westbury, L.C., in giving judgment (*m*), said:—

"The objection of the appellants is founded on the 8th section of the statute, and may be thus stated:—The statute cannot be applied to render valid any devise contained in the will of a married woman, which would not have been valid before the Act. But the will of Margaretta Nicholl, if made before the statute, would not have been valid as an appointment of the estate in question. Therefore, say the appellants, the Court cannot apply to this will the beneficial principles and rules of construction which are introduced by the 24th and 27th sections of the Act, and which are necessary to render the will a valid appointment. In other words, the plaintiffs contend that the application to this will of the 24th section of the statute, thereby giving a subsequent date to the will, is to confer a testamentary capacity which would not otherwise exist, and that this is forbidden by the 8th section. They insist that by applying the statute you make the will of a *feme covert* include that which, but for the statute, it would not; you enlarge her capacity, and make her will valid as to property of which, without the statute, it would not be a valid disposition. It is obvious that the result of this reasoning would exclude all wills of married women from the benefit of the provisions of the Act, wherever, by virtue of its enactment, such wills would receive a more extended operation. Such could hardly have been the intention of the Legislature. We may perhaps ascertain the meaning of the 8th section by adverting to the state of the law at the time of the introduction of the Act, and observing the manner in which the Act is constructed. By the law, as it stood at the time when the Act was passed, an infant might make a valid will of personal estate, but a married woman had no testamentary capacity except by virtue of a delegated authority. By means of a power or under a trust, as in the case of separate estate, a married woman might, by a writing in the nature of a will, dispose of real or personal estate, and with the licence and consent of her husband she might make a will, properly so called, of personal property. It was the intention of the Legislature by the new statute to render infants absolutely incapable of making a will; but it has, I think, preserved the testamentary status of married women exactly as it stood under the existing law. Therefore, the married woman's devise of real estate must still be made by means of a trust or power created for the purpose, and her capacity to bequeath personal estate must still be derived from the licence and authority of her husband. A distinction exists between the testamentary power of a *feme covert* and the effect and operation of her testamentary appointment. No greater testamentary power is to be obtained from the Act than would otherwise have existed. But an effect

(*m*) The L.C. went so fully into the question of the testamentary capacity of a married woman, and the effect thereon of the Wills Act, that the judgment is here given *in extenso*. See also *Willock* v. *Noble*, L. R. 8 Ch. 778; 7 H. L. 580.

and operation may be given under the statute to a testamentary instrument executed by a married woman, which may make that instrument a valid exercise of an existing testamentary power, which before the statute it would not have been held to be. To render, however, the will of Margaretta, made in 1838, a valid appointment by way of devise of the estates in question under the statute, it is still necessary that Margaretta should have had at the time of her decease full power and right to make such a testamentary appointment without the aid of the statute. This she undoubtedly had, and her will, by being made to speak at the time of her death, still depends for its operation on the extent of her then existing testamentary authority. It seems to me, therefore, that the meaning of the 8th section may be correctly given by this paraphrase—No married woman shall acquire under this statute any greater testamentary right or power than married women are now capable of possessing by the existing law. In short, the legal testamentary status of a *feme covert* is to remain the same. And this is confirmed by observing the manner of the construction of the Act. First, the word 'will' is made to include appointments by will, or by writing in the nature of a will, in exercise of a power. And next, the third section is so worded as to give the most extensive testamentary power to every person, which word would include infants and married women, and render them as competent as any other persons but for the effect of the 7th and 8th sections. By the 7th section the infant is absolutely disqualified. By the 8th section, the legal position of the *feme covert* is to remain as before. Personally, she acquires no enlarged capacity from the statute, although her testamentary instrument or will, when made, may have the benefit of more liberal rules of interpretation. But the appointment and the will are still to be confined within the limits of the authority of the maker, existing at the time of the death. It is not, however, necessary that the authority should exist at the time of the execution of the instrument if it be afterwards acquired, and be subsisting at the time of the death of the testatrix. Such appears to me to be the meaning of the language of the Act, and to have been the intention and policy of the law. I have no difficulty in holding that by virtue of the 24th section the will of Margaretta is to be read and applied as if it had been executed immediately before her decease, and that under the 27th section the general devise contained in the will, so being considered to have been re-executed, is a good execution of the power of appointment given to the survivor (*n*)."

Married Women's Property Act, 1882.

Under the Married Women's Property Act, 1882 (*o*), a married woman is, after 1882, in accordance with the provisions of that Act, capable of disposing by will of any real or personal property as her separate property, in the same manner as if she were a *feme sole*; and every woman married after 1882 is entitled

(*n*) It seems therefore that a general power to appoint by will, given to the survivor of several persons, may be well exercised before he becomes the survivor; but it is doubtful whether this applies to special powers; see Farwell on Powers, 129, 130; *Re Blackburn*, 43 Ch. D. 75.

(*o*) 45 & 46 Vict. c. 75, ss. 1, 2, 5, and 19.

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to dispose of in manner aforesaid all property which shall belong to her at marriage, or shall be acquired by or devolve upon her after marriage; and every woman married before 1883 is entitled to dispose of in manner aforesaid as her separate property all property, her title (*p*) to which, whether vested or contingent, and whether in possession, reversion, or remainder, shall accrue after 1882. This power of disposition of a married woman is, however, subject to the provisions of any settlement made before or after marriage: and it applies only to property to which she is entitled during coverture, and therefore her will made during coverture is not operative on property which she does not acquire until after the coverture is at an end (*q*).

The Wills Act did not alter the prior law that a person not of a sound disposing mind, whether from idiotcy, insanity, or other cause, is incompetent to make a will (*r*).

Lapse.

Two exceptions (Ss. 32, 33).

With two exceptions made by the statute (*s*), in every case of testamentary disposition the law implies the condition that the devisee shall survive the testator; otherwise the gift in his favour will fail, or, as it is termed, "lapse." Lapse is not prevented by the land being given to the devisee "and his heirs," which are but words of limitation. But, by the 32nd section, if a person to whom real estate has been devised for an estate tail, or *quasi*-entail, dies in the lifetime of the testator, leaving issue, who would be inheritable under the entail, and any such issue are living at the testator's death, the devise does not lapse, but takes effect as if that person had died immediately after the testator, unless a contrary intention appears by the will. The 33rd section provides that where a person being a child or other issue of the testator, to whom any real or personal estate has been devised or bequeathed for an estate or interest not determinable at or before his or her death, dies in the lifetime of the testator leaving issue living at the testator's death: the gift shall not lapse, but shall take effect as if such person had died immediately after the testator, unless a contrary intention appear by the will. It should be observed that neither section substitutes the issue for the deceased devisee; but the 32nd section makes the subject-matter of the devise

Devise of estate tail.

Devise to issue of testator.

(*p*) The date at which the title was acquired, not the date at which the property falls into possession, is the date referred to; see the cases collected in Wolstenholme & Turner, on the Conveyancing, &c., Acts, 5th ed. 191.

(*q*) *Re Price, Stafford* v. *Stafford*, 28 Ch. D. 709.

(*r*) *Smith* v. *Tebbitt*, L. R. 1 P. & D. 398.

(*s*) 1 Vict. c. 26, ss. 32 and 33.

descend as if the intended donee had actually been the donee in tail; the 33rd section makes the subject-matter of the devise the absolute property of the deceased devisee, and as such it will pass by his will, or descend from him as purchaser, notwithstanding that he died before the testator.

Gift to class.

The 33rd section does not apply to gifts to classes, for the class being ascertained, where the gift is immediate, at the testator's death, and where the gift is not immediate, at some subsequent time, there is no gift to the child dying before the testator, as he is in neither case a member of the class, and so no lapse (*t*); nor does it apply to gifts under a special power of appointment, as a power to appoint to children, so as to prevent a lapse upon the death of an appointee. In such a case the property goes to the persons entitled in default of appointment, not by virtue of the intention of the donee of the power, who has no control over the property, but by virtue of the direction of the donor (*u*). But it does apply to gifts under a general power of appointment, although there is a gift over in default of appointment (*x*).

Residuary devise.

Unless there be a residuary devise, lapsed devises go to the heir-at-law; and, in the like case, the heir is entitled to lapsed gifts of the proceeds of real estate directed to be converted (*y*); if the failure of the gifts is total, he takes them as realty (*z*); if partial, as personalty (*a*).

In wills made before 1838, a residuary devise does not include a devise that lapses (*b*); but probably it does include a devise which was void *ab initio* owing to the death of the devisee before the date of the will (*c*). The rule as to lapsed devises is reversed as to wills made or republished after 1837 by the Wills Act, which provides (*d*) that—

S. 25. "Unless a contrary intention shall appear by the will, such real estate or interest therein as shall be comprised or intended

(*t*) 4 Dav. 42, 341; see *Dimond* v. *Bostock*, L. R. 10 Ch. 358; *re Coleman and Jarrom*, 4 Ch. D. 165.

(*u*) See *per* Shadwell, V.-C., in *Griffiths* v. *Gale*, 12 Sim. 359. And see *Holyland* v. *Lewin*, 26 Ch. D. 266.

(*x*) See *per* Wood, V.-C., in *Eccles* v. *Cheyne*, 2 K. & J. 676; and Tudor, L. C. R. P. 916, notes to *Elliot* v. *Davenport*.

(*y*) *Ackroyd* v. *Smithson*, 1 W. & T. L. C. 1027; *Court* v. *Buckland*, 1 Ch. D. at 610; and 1 Jarman on Wills, 621.

(*z*) *Smith* v. *Claxton*, 4 Mad. 484.

(*a*) *Jessopp* v. *Watson*, 1 My. & K. 665; and *Smith* v. *Claxton*, 4 Mad. 484.

(*b*) *Wright* v. *Horne*, 8 Mod. 225, note (*c*).

(*c*) Hawkins on Wills, 44, citing *Doe* d. *Stewart* v. *Sheffield*. But the point is open to doubt; 1 Jarman on Wills, 4th ed. 646.

(*d*) 1 Vict. c. 26, s. 25.

to be comprised in any devise in such will contained, which shall fail or be void by reason of the death of the devisee in the lifetime of the testator, or by reason of such devise being contrary to law, or otherwise incapable of taking effect, shall be included in the residuary devise (if any) contained in such will."

Will speaks from death. (1 Vict. c. 26).

By the Wills Act, a will is made to speak from the death of the testator, unless a contrary intention appear in it (*e*). It is enacted—

S. 24. "That every will shall be construed, with reference to the real estate and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will."

The effect of this provision is to reverse the old rule (*f*) and to enable a devise to operate on the land belonging to a testator at his death, notwithstanding that he acquired it after the date of his will.

Revocation (*g*).

Every testamentary disposition is liable to be revoked by the testator. This may be effected in three different manners:—

(1) by a provision in a subsequent codicil or will expressly revoking the previous disposition; (2) by an inconsistent disposition contained in a subsequent will or codicil (*h*); and (3) by wholly revoking the instrument containing the disposition.

If dispositions which are apparently inconsistent occur in the same will, the Court will, if possible, endeavour to reconcile them (*i*).

For example, if the same property is given to different persons in different parts of the same will, they take as joint tenants or tenants in common (*k*). If land is given to one person without, and to another person with, words of limitation, the latter will take a fee in remainder (*l*). If immediate estates in fee and in tail, or in fee and for life, are given in the same lands, the devise in fee will be held to be a remainder, even if it precedes the devise of the particular estate (*m*). If the clauses are wholly irreconcilable, the latter prevails (*n*).

(*e*) See *In re Russell*, 19 Ch. D. 432; and *In re Portal and Lamb*, 27 Ch. D. 600.

(*f*) *Ante*, p. 378.

(*g*) See Theobald on Wills, ch. vi. p. 32.

(*h*) Theob. Wills, 531.

(*i*) See Theob. Wills, 534.

(*k*) See the authorities collected in the note to *Paramour* v. *Yardley*, Plowd. at 541. But this does not apply to a case of will and codicil; *Evans* v. *Evans*, 17 Sim. 107.

(*l*) *Gravenor* v. *Watkins*, L. R. 6 C. P. 500.

(*m*) *Wallop* v. *Derby*, Yelv. 209.

(*n*) This rule was spoken of as "a mere rule of thumb," by Jessel, M.R., in *Re Bywater*, 18 Ch. D., at pp. 19, 20.

The will and codicil must, if possible, be construed together. If the disposition in the codicil is inconsistent with that in the will, it must prevail; but it is an established rule that the dispositions made in the codicil are not to disturb those in the will further than is necessary for the purpose of giving effect to the intentions expressed in the codicil (*o*).

Under the Statute of Frauds (*p*) there were three express methods of revoking a will of land :—

First, by a subsequent will or codicil, duly executed so as to pass land, containing an express clause revoking former wills ; *Second*, by a writing declaring the intention of revoking the will, signed by the testator in the presence of three witnesses, who need not subscribe in the presence of the testator; *Third*, by the testator, or some person in his presence, and by his express directions, cancelling the will; *i.e.*, obliterating or defacing the signature of the testator, or burning, tearing, or otherwise destroying, the will. It has been pointed out (*q*) that cancellation is in itself an ambiguous act. A man may throw his will into the fire, believing it to be another document; this would not be sufficient to revoke the will. Cancellation to be effective must be done with the intention of revoking the will.

Revocation might also be implied owing to the alteration of the testator's circumstances, the most common case of which was marriage and the birth of a child (who might be posthumous) (*r*), but neither of these events alone (*s*) operated as a revocation.

Any conveyance to a stranger of the land devised, even if it was reconveyed to the testator, or even if the stranger stood seised to the use of the testator and his heirs by the conveyance itself, operated as a revocation of the devise, because, by the alienation, the testator ceased to "have" the lands, so that they could not pass by his will (*t*). The rule was the same if

(*o*) *Per* Lord St. Leonards, *Young* v. *Hassard*, 1 Dr. & War. at 644.

(*p*) 29 Car. II. c. 3, s. 6, on which see 6 Cruise, Dig. ch. vi. p. 73.

(*q*) *Per* Lord Mansfield, *Burtenshaw* v. *Gilbert*, 1 Cowp. at p. 52. See 6 Cruise, Dig. 83.

(*r*) 6 Cruise, Dig. 89, 90.

(*s*) 6 Cruise, Dig. ch. vi. p. 91 (s. 54). There were some exceptions to the rule, which are stated in 7 Bythewood & Jarman by Robbins, 4th edit., 376, note. In the case of a woman, a will made before marriage was revoked by her marriage, but if she survived her husband, the will was revived ; *Forse and Hembling's Case*, 4 Rep. 60*b* ; 6 Cruise, Dig. 92 (s. 57).

(*t*) *Burgoine* v. *Fox*, 1 Atk. 575 ; *Darley* v. *Darley*, 3 Wils. 6 ; 6 Cruise, Dig. 93.

the testator was entitled in equity only (*u*); but it did not apply to a partition where the conveyance merely assured to the testator an estate in the allotted lands precisely corresponding with that which he previously had in his undivided share (*v*). Nor did it apply to a conveyance by way of mortgage (*x*), or in trust for sale for the payment of debts generally (*y*). But if the partition or mortgage deed did not stop with effecting the partition or mortgage, but modified the ulterior ownership, it revoked the devise (*z*).

Revocation under the Wills Act.

Since 1837 the revocation of wills and codicils depends on the provisions of the Wills Act (*a*), which, after providing (*b*) for revocation by marriage (which case is dealt with below) enacts that:—

> (S. 20.) "No will or codicil, or any part thereof shall be revoked otherwise than as aforesaid (*c*), or by another will or codicil executed in manner hereinbefore required, or by some writing declaring an intention to revoke the same, and executed in the manner in which a will is hereinbefore required to be executed, or by the burning, tearing, or otherwise destroying the same, by the testator, or by some person in his presence, and by his direction, with the intention of revoking the same."

It should be observed that the expression "this is my *last* will" does not operate as the revocation of a prior will (*d*).

The following case (*e*) shows when a will is not to be considered "otherwise destroyed" within section 20, so as to be revoked:—

The will and codicils were, at the testator's death, found upon the kitchen table. The testator had drawn a pen through the lines or some part of the will, leaving the words perfectly legible, and had written on the back, "all these are revoked." A housekeeper, who had been nine years with the testator, and left in January, 1876, stated that she had heard the testator speak about his wills, and say he had made two or three, but that he had cancelled them, and they were good for nothing, and that the testator had in her presence taken up this will and thrown

(*u*) *Earl of Lincoln's Case*, Show. Parl. Ca. 154; S.C., 1 Eq. Ca. Ab. 411, pl. 11.

(*v*) *Luther* v. *Kirby*, cited 3 P. Wms. 170.

(*x*) *Hall* v. *Dunch*, 2 Ch. Rep. 154.

(*y*) *Vernon* v. *Jones*, 2 Vern. 243.

(*z*) *Titner* v. *Titner*, cited in 1 Wils. 309; *Harmood* v. *Oglander*, 6 Ves. 199. See the cases collected in 11 Sweet's Bythewood & Jarman, 3rd ed. at 107, and in the 4th ed., by Robbins, vol. vii. p. 385.

(*a*) 1 Vict. c. 26.

(*b*) *Ib.* s. 18.

(*c*) *I.e.*, by marriage.

(*d*) *Re De La Saussaye*, L. R. 3 P. & D. 42; *Re Pechell*, *ib.* 153; *Freeman* v. *Freeman*, 5 De G. M. & G. 704. It should be noted that a general clause of revocation in a will revokes a prior testamentary appointment, *Sotheran* v. *Denny*, 20 Ch. D. 99.

(*e*) *Cheese* v. *Lovejoy*, 2 P. D. 251; and see *Hellier* v. *Hellier*, 9 P. D. 237.

it among a heap of waste paper on the floor. The housemaid deposed that she had first seen the document about eleven years ago in the testator's sitting-room, under the cushion on the sofa. That about seven or eight years ago the testator kicked it into a corner of the sitting-room among a quantity of other papers, and that she took it out of the sitting-room, where it was lying by the coal-box, along with other scraps of paper, and took it into the kitchen, where she put it on the table. Then it was sometimes on the table, sometimes on the kitchen window, and sometimes on a chair, just where she chose to put it, but the testator never asked for it, nor was it produced to him again. The Judge, being of opinion that there was no evidence of revocation within the 20th section of the Wills Act, directed the jury to find a verdict for the plaintiff. The principal defendants excepted to this ruling in order to bring the case before the Court of Appeal.

The judgment on appeal was delivered by James, L.J., who said:—

"We cannot allow the appeal in this case. It is quite clear that a symbolical burning will not do, a symbolical tearing will not do, nor will a symbolical destruction. There must be the act as well as the intention. As it was put by Dr. Deane in the Court below, 'All the destroying in the world without intention would not revoke a will, nor all the intention in the world without destroying: there must be the two.'"

Loss or destruction.

Where a will is shown to have been in the custody of a testator, and it is not found at his death, the presumption, in the absence of evidence to the contrary, is that the testator himself destroyed it (*ee*). But that presumption may be rebutted: and if a will be lost or destroyed without the intention of revoking it, and the substance of it can be ascertained by means of the original instructions, or by a copy of the will, or by the recollection of persons who heard it read over, probate will be granted of a paper embodying such substance (*f*). The will of Lord St. Leonards was not forthcoming, though eight codicils to it were; there being no evidence of an intention to revoke the will, the Court, mainly on the evidence and recollection of the testator's daughter, Miss Sugden, pronounced for the validity of the will and codicils (*g*).

Revocation by marriage.

A will is also revoked by the marriage of the testator, except a

(*ee*) *Per* Sir J. Hannen, *Sugden* v. *St. Leonards*, 1 P. D. at p. 195.

(*f*) Hayes & Jarman, 37.

(*g*) *Sugden* v. *Lord St. Leonards*, 1 P. D. 154. See the observations on this case in *Woodward* v. *Goulstone*, 11 App. Cas. 469, where Lord Herschell, L.C., observed that "to support a will propounded, when it is proved by parol evidence only, that evidence ought to be of extreme cogency, and such as to satisfy one beyond all reasonable doubt that there is really before one substantially the testamentary intention of the testator" (*Ib.* p. 475); and see *Harris* v. *Knight*, 15 P. D. 170.

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will made under a power of appointment, when the real or personal estate thereby appointed would not, in default of such appointment, pass to the heir, customary heir, executor or administrator, or the person entitled as next of kin under the Statute of Distributions, of the testator (*h*).

But no will is revoked by any presumption of intention from alteration of circumstances (*i*); and no conveyance or other act made or done subsequently to the execution of a will of or relating to any real or personal estate therein comprised, except an act by which such will is revoked, prevents the operation of the will with respect to such estate or interest in such real or personal estate as the testator shall have power to dispose of by will at the time of his death (*j*).

Obliteration—interlineation—alteration. (S. 21.)

No obliteration, interlineation, or other alteration made in any will after the execution thereof, has any effect (except so far as the words or effect of the will before such alteration shall not be apparent) unless such alteration be executed in like manner as required by the Act for the execution of the will (*k*). And, contrary to the case of a deed (for a deed cannot be altered after it is executed without fraud or wrong, and the presumption is against fraud and wrong (*l*)), it will generally be presumed that an alteration appearing on the face of a will was made after execution (*m*). But alterations made prior to execution will be read as part of the will, if identified in any way provided by the 21st section of the Wills Act.

Revival.

No will, or any codicil, or any part thereof, once revoked, can be revived otherwise than by re-execution, or by a duly executed codicil showing an intention to revive the same. And it is further provided (*n*) that:—

1 Vict. c. 26, s. 22.

> "When any will or codicil which shall be partly revoked, and afterwards wholly revoked, shall be revived, such revival shall not extend to so much thereof as shall have been revoked before the revocation of the whole thereof, unless an intention to the contrary shall be shown."

Mistaken reference to revoked will.

Where a testator made a will, and afterwards another, which,

(*h*) Wills Act, 1 Vict. c. 26, s. 18. On the construction of this section, see *Re Fitzroy*, 1 Sw. & Tr. 133; *Re Fenwick*, L. R. 1 P. & D. 319; *Vaughan* v. *Vanderstegen*, 2 Drew. 165; *In re Russell*, 15 P. D. 111.

(*i*) 1 Vict. c. 26, s. 19.

(*j*) *Ib.* s. 23.

(*k*) *Ib.* s. 21.

(*l*) Co. Litt. 225*b*; Elph. N. & C. Interp. 17, as to alterations in deeds.

(*m*) See Hayes & Jarman, 38; Theob. Wills, 30.

(*n*) 1 Vict. c. 26, s. 22.

by implication, revoked the earlier will, and subsequently, by the terms of a duly executed codicil, by mistake referred to the earlier instead of the later will; it was held that the codicil revived the earlier will, and that, as it did not revoke the later will, all three documents must be admitted to probate (*o*).

What passes by the devise.

The principal questions that arise on the interpretation of a devise are the following:—(1), What passes by the devise? and (2), What estate is given to the devisee? It need hardly be said that these are questions of the utmost difficulty, and that we can within the necessary limits of this work do little more than indicate the nature of them.

"Lands," "tenements," "hereditaments."

Prior to the Act supplying a surrender of copyholds to the use of the will (*p*), if a testator had only an equitable estate (*q*) in copyholds, it passed by a devise of "lands," "lands and tenements," or, "lands, tenements, and hereditaments;" and, after the passing of that Act, the legal estate passed by the same words (*r*).

In wills made before 1838, leaseholds for years did not pass by these words, unless the testator had no freeholds (*s*), or the leaseholds were intermixed and enjoyed with the freeholds (*t*).

This rule is altered by the 26th section of the Wills Act (1 Vict. c. 26), which provides that:—

1 Vict. c. 26, s. 26.

> "A devise of the land of the testator, or of the land of the testator in any place or in the occupation of any person mentioned in his will, or otherwise described in a general manner, and any other general devise which would describe a customary, copyhold, or leasehold estate if the testator had no freehold estate which could be described by it, shall be construed to include the customary, copyhold, and leasehold estates of the testator, or his customary, copyhold and leasehold estates, or any of them, to which such description shall extend, as the case may be, as well as freehold estates, unless a contrary intention shall appear by the will."

"Real estate."

The term "real estate" is properly applicable to copyholds but not to leaseholds. It follows that if before 55 Geo. III. c. 192, the testator had only an equitable estate in copyholds, it passed by a devise of "real estate," and that after the passing of that Act, the legal estate passed by the same words.

(*o*) *In the Goods of Stedham*, 6 P. D. 205; and see *In the Goods of Dyke*, *Ib.* 207. In both cases there was not a mere mistake as to date in the reference to the will, but the codicil was constructed with a view to the substance of the provisions in the will referred to

(*p*) 55 Geo. III. c. 192 *Ante*, p. 316.

(*q*) *Car* v. *Ellison*, 3 Atk. 73.

(*r*) *Doe* d. *Clarke* v. *Ludlam*, 7 Bing. 275.

(*s*) *Rose* v. *Bartlett*, Cro. Car. 293.

(*t*) *Hobson* v. *Blackburn*, 1 My. & K. 571.

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On the other hand, leaseholds for years will not pass by a devise of "real estate," either before or after the Wills Act (*u*), unless the testator had no freeholds, or he describes the "real estate" by reference to locality, and had no freeholds at the place (*x*), or he uses other language showing that he intended to include the leaseholds (*y*).

"Rents and profits"—"income."

A devise of the rents and profits (*z*) or of the income (*a*) of lands passes the lands both at law and in equity; and since 1837 it passes, but before 1838 it did not pass (*b*), the fee simple.

We have already pointed out that in Wills since 1837 a general devise operates as the execution of a general power (*d*).

Trust and mortgage estates.

In addition to his own estates of inheritance vested in a man at his death, others are often vested in him as trustee or mortgagee. Questions arose as to the operation of a general devise on such estates. The principle was laid down by Lord Eldon (*e*), and has not been since doubted, that, where a mortgagee or trustee makes a general devise of real estate, the mortgage and trust estates will pass thereby, "unless it is to be collected from expressions used in the will, or purposes or objects of the testator, that he did not mean they should pass."

A general devise will not pass a trust estate, or a mortgaged estate vested in a trustee, if any intent appears to treat the property comprised therein in a manner inconsistent with the nature of trust property (*f*). Thus, where a testator charges the property comprised in a general devise with debts, or with debts and legacies or with legacies only, the legal estate in property vested in the testator as trustee or as mortgagee will not pass under such general devise (*g*); for his intention must be taken to be, to pass by the devise only estates which he had power to subject to such charges, that is to say, those which were, equitably as well as legally, his own (*h*).

(*u*) 1 Vict. c. 26. *Butler* v. *Butler*, 28 Ch. D. 66, where the prior cases are discussed.

(*x*) *Day* v. *Trig*, 1 P. W. 286; *Doe* d. *Dunning* v. *Cranstoun*, 7 M. & W. 11; *Gully* v. *Davis*, L. R. 10 Eq. 562. In each of these cases the words were "freehold land," but the reasoning applies to the words "real estate." See also *Wilson* v. *Eden*, 11 Beav. 237; 5 Ex. 752; 14 Beav. 317; 18 Q. B. 474; 16 Beav. 153.

(*y*) *Swift* v. *Swift*, 1 De G. F. & J. 160.

(*z*) Co. Litt. 4*b*.

(*a*) *Mannox* v. *Greener*, L. R. 14 Eq. 456.

(*b*) *Plenty* v. *West*, 6 C. B. 201; *Mannox* v. *Greener*, *ubi sup.*

(*d*) *Ante*, p. 295; and see *post*, p. 394.

(*e*) 1803, in *Lord Braybroke* v. *Inskip*, Tudor, L. C. R. P. 990.

(*f*) *Ib.* p. 993, quoting the authorities.

(*g*) See *Re Bellis*, 5 Ch. D. 504.

(*h*) *Doe* v. *Lightfoot*, 8 M. & W., 553.

By the Conveyancing and Law of Property Act, 1881 (*i*), any estate or interest vested on any trust or by way of mortgage in any person solely, on his death (after 1881), notwithstanding any testamentary disposition, devolves to and vests in his personal representatives in the same manner as if it were a chattel real.

This section has been repealed "as to land of copyhold or customary tenure vested in the tenant on the Court Rolls of any manor" by the Copyhold Act, 1887 (*j*). It is doubtful whether the provisions of this section apply to cases of death before the passing of the Act (*k*).

Execution of trust by devisee.

The further question arose, how far the devise of a trust estate would do more than pass the legal estate, in other words, how far the devisee could execute the trust; and it was held to depend on the intention of the author of the trust, to be collected from the terms in which the instrument was expressed (*l*). The question turned on whether a personal confidence was reposed in the persons named.

In the case of persons dying after 1881, the Conveyancing and Law of Property Act, 1881 (*m*), in continuation of the above enactment, gives the like powers to the deceased's personal representatives to dispose of and deal with the trust and mortgage estates as if the same were a chattel real, with all the like incidents, but subject to all the like rights, equities, and obligations; and for such purposes the deceased's personal representatives are to be deemed his heirs and assigns within the meaning of all trusts and powers.

It will be observed that this section does not enable the personal representatives to execute the trusts in all cases; it vests the trust property in them and only enables them to execute the trust in cases where the heirs or the assigns of the deceased trustee would have been able to do so if the Act had not been passed.

Execution of power of appointment by will.

Primâ facie a gift not expressed to be made by virtue of a power, relates to the testator's own property only, not to that over which he has a power (*n*).

The rule is subject to two exceptions: *first*, if the property the subject of the power be described sufficiently to show that the

(*i*) 44 & 45 Vict. c. 41, s. 30.

(*j*) 50 & 51 Vict. c. 73, s. 45.

(*k*) 16 Sept. 1887. See *Re Mills*, 37 Ch. D. 312; 40 Ch. D. 14.

(*l*) Lewin on Trusts, 230; and *In re Burtt*, 1 Drew. 319. See *Osborne to Rowlett*, 13 Ch. D. 774; *Re Morton and Hallett*, 15 Ch. D. 143; Dart, V. & P. 682.

(*m*) 44 & 45 Vict. c. 41, s. 30.

(*n*) *Clere's Case*, 6 Rep. 17*b*; *Webb* v. *Honnor*, 1 J. & W. 352.

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testator intended to dispose of it, the gift operates as an execution of the power; but there must be clear words of reference to the property (*o*).

General devise before Wills Act.

Second, if, before 1838, a testator made a general devise of "land" or "real estate," and had no land at the date of his will, the devise passed land over which he had only a power, whether general or special (so far, in the case of a special power, as the devisees were objects of the power) (*p*). The reason of this exception is that, as the will could not pass land acquired after its execution, either the land subject to the power must have passed or the devise have been nugatory. But such a devise after 1837 does not exercise a special power (*q*), as it is possible that the testator may after the date of the will acquire land to which the words would be applicable. And the rule is altered as to general powers by the Wills Act, which provides (*r*) that after 1837 general devises of the real estate of the testator or of the real estate of the testator described in a general manner, "shall be construed to include any real estate of the testator, or any real estate to which such description shall extend (as the case may be), which the testator may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention appears by the will."

Wills Act, s. 27.

Devise without words of limitation.

In wills before 1838 a devise without words of limitation conferred an estate for life only on the devisee. This rule was subject to numerous exceptions (*s*), the most important of which was that, if the words did not denote the property itself but the *quantum* of interest that the testator had in the property, then the whole of such interest passed by the devise (*t*). The word "estate" is ambiguous; it may mean the land itself or the testator's interest in it. The latter construction is placed on it in a gift of "estate" or "estates," so that such a gift was sufficient to pass the fee simple or other the whole interest of the testator (*u*).

(*o*) *Re David's Trusts*, 1 John. 495; *Innes* v. *Sayer*, 3 Mac. & G. 606; *Lowndes* v. *Lowndes*, 1 Y. & J. 445.

(*p*) *Denn* v. *Roake*, 6 Bing. 475. Farwell, Pow. 146, 179; Theobald on Wills, 163; Hawkins on Wills, 25. The rule even applied to special powers; *Wallop* v. *Portsmouth*, Sugd. Pow., 916.

(*q*) *Re Mills*, 34 Ch. 186, *Re Williams*, 42 Ch. D. 93.

(*r*) 1 Vict. c. 26, s. 27. See *ante*, p. 295.

(*s*) This subject is discussed in Hawkins on Wills, 130; Theob. on Wills, 303; and *ante*, p. 80.

(*t*) *Hogan* v. *Jackson*, Cowp. 306.

(*u*) *Doe* d. *Burton* v. *White*, 1 Ex. 534.

Devise with charge.

It was also held that a gift without words of limitation was enlarged by the imposition of a pecuniary charge, however small, on the person of the devisee, or on the interest devised to him. But this was not the case if the devise was merely made "subject to" a charge (*x*). The reason for the rule appears to be that, as the devisee had to pay the money at all events, he might die before he could repay himself out of the estate, in which case he would be a loser by the devise if he did not take the fee (*y*).

The Wills Act altered the rule as to wills made after 1837 by providing that:—

Devise without words of limitation. 1 Vict. c. 26, s. 28.

(S. 28.) "Where any real estate shall be devised to any person without any words of limitation, such devise shall be construed to pass the fee simple, or other the whole estate or interest which the testator had power to dispose of by will in such real estate, unless a contrary intention shall appear by the will."

Mr. Jarman (*z*) points out that:—

"The effect of the 28th section is not wholly to preclude, with respect to wills made or republished since the year 1837, the question whether an estate in fee will pass without words of limitation, but merely to reverse the rule. Formerly, nothing more than an estate for life would pass by an indefinite devise, unless a contrary intention could be gathered from the context. Now, an estate in fee will pass by such a devise, 'unless a contrary intention shall appear by the will.' The *onus probandi* (so to speak) will, under the new law, lie on those who contend for the restricted construction."

Estates tail —"issue;"

A devise to "A. and the heirs of his body" in wills (whether before or after the Wills Act), confers an estate tail on A. In devises, "issue" is *primâ facie* a word of limitation and equivalent to "heirs of the body" (*a*). A devise to "A. and his issue," or to "A. for life, with remainder to his issue," vests an estate tail in A. But the word "issue" may be a word of purchase; for example, where there is a gift to A. for life, with remainder to his issue as tenants in common, the issue take by purchase (*b*), and, in the case of a will after 1837, they take the fee simple. There are some few other cases in which the context shows that "issue" does not confer an estate tail on the first taker (*c*).

(*x*) *Doe* d. *Stevens* v. *Snelling*, 5 East, 87; *Doe* d. *Sams* v. *Garlick*, 14 M. & W. 698; *Burton* v. *Powers*, 3 K. & J. 170.

(*y*) See Mr. Hargrave's note Co. Litt. 9*b*.

(*z*) Jarman on Wills, vol. ii. 287.

(*a*) *Roddy* v. *Fitzgerald*, 6 H. L. C. 823.

(*b*) *Montgomery* v. *Montgomery*, 3 Jo. & Lat. 47; Hawk. Wills, 193.

(*c*) See Hawk. Wills, 195 *et seq.*

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—"children."

The words "children," "child" and "son" are sometimes used as words of limitation. Thus, a gift to A. and his "children," or "child," or "son," may confer an estate tail on A. (*d*).

In wills before 1838, a devise of an estate for life or in fee simple on A., followed by a gift over on general failure of his issue, confers an estate tail on A. (*e*).

Death without issue.

In wills before 1838, words referring to the death of a person without issue (whether the terms be "if he die without issue," "if he have no issue," "if he die without having issue," "if he die before he has any issue," "for want of issue," "in default of issue"), if unexplained by the context, are construed to mean an indefinite failure of issue, *i.e.*, a failure or extinction of issue at any time (*f*).

There were two exceptions to the rule. Though the phrase "leaving no issue," when applied to realty, meant an indefinite failure of issue, yet in some cases the context showed that, when applied to personalty, it meant failure of issue at the death of the *propositus* (*i.e.*, the person whose issue are referred to).

The other exception to the rule was where a testator, having no issue at the time of making his will, devised property on failure or in default of his own issue, in which case it was considered that his object was simply to make the devise contingent on his leaving no issue surviving him (*g*). The questions arising on the application of the rule were of the utmost nicety, but they have been obviated as to wills after 1837 by the following provision of the Wills Act:—

Words importing failure of issue to mean issue living at the death. 1 Vict. c. 26, s. 29.

(S. 29.) "In any devise or bequest of real or personal estate the words 'die without issue,' or 'die without leaving issue,' or 'have no issue,' or any other words which may import either a want or failure of issue of any person in his lifetime or at the time of his death, or an indefinite failure of his issue, shall be construed to mean a want or failure of issue in the lifetime, or at the time of the death of such person, and not an indefinite failure of his issue, unless a contrary intention shall appear by the will, by reason of such person having a prior estate tail, or of a preceding gift being, without any implication arising from such words, a limitation of an estate tail to such person or issue, or otherwise: Provided, that this Act shall not extend to cases where such words as aforesaid import if no issue described in a preceding gift shall be born, or

(*d*) Hawk. Wills, 199; Theob. Wills, 309.

(*e*) *Dansey* v. *Griffiths*, 4 M. S. 61; *Blackborn* v. *Edgley*, 1 P. W. 600; *Machell* v. *Weeding*, 8 Sim. 4.

(*f*) See notes to *Forth* v. *Chapman*, in Tud. L. C. R. P. 682.

(*g*) 2 Jarman on Wills, ch. xli.

if there shall be no issue who shall live to attain the age, or otherwise answer the description required for obtaining a vested estate by a preceding gift to such issue (*h*)."

Mr. Jarman says (*i*):—

"The result of the new doctrine contained in the 29th section appears to be, that the words denoting a failure of issue refer to a failure at the death in every case, unless one of two points can be established:—First, that the words are referential to the objects of a prior estate or a preceding gift; or, secondly, that they are so clearly and explicitly used to denote a failure of issue at any time as to exclude the statutory rule of construction, which, it will be observed, only obtains where there is an ambiguity—*i.e.*, where the words may import either a failure of issue in the lifetime or at the death, or an indefinite failure of issue. If, therefore, a testator by a will made or republished since 1837, devise real estate to A. or to A. and his heirs, and if A. shall die and his issue shall fail at any time, then to B., A. will take an estate tail, as he formerly would have done without these special amplifying words, which exclude, beyond all question, the application of the enacted doctrine."

When trustees take the legal estate.

Two questions may arise where there is a devise to one person in trust for another:—*First*, does the devisee take the legal estate, or does the legal estate pass to the beneficiary by virtue of the Statute of Uses? *Secondly*, supposing that the trustee takes the legal estate, what is the *quantum* of that estate?

The answer to the first question depends upon whether any active duties are imposed on the trustee; if they are, he takes the legal estate in order to enable him to perform those duties (*k*).

Thus a devise to trustees in trust to pay the profits to A., vests the legal estate in the trustees, because they cannot pay the profits till they have received them, and in order to take them they require the legal estate. On the other hand, a devise to trustees in trust to permit A. to receive the rents and profits, vests the legal estate in A.; for in this case there is no reason why the trustees should retain the legal estate, and the Statute of Uses produces its effect in shifting the legal estate to A. (*l*).

A devise in trust to "pay to or permit" A. to receive the rents and profits vests the legal estate in A., on the ground that, there being two inconsistent clauses, the latter ("to permit") must prevail (*m*).

(*h*) *Re Ball*, 36 Ch. D. 508.

(*i*) Jarman on Wills, vol. ii. 533.

(*k*) See Tud. L. C. R. P., notes to *Tyrell's Case*, at p. 353.

(*l*) Hawk. Wills, 140; *Barker* v. *Greenwood*, 4 M. & W. 421.

(*m*) *Doe* d. *Leicester* v. *Biggs*, 2 Taunt. 109; see, however, *Re Lashmar, Moody* v. *Penfold*, (1891) 1 Ch. 258.

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When trustees take fee simple.

Where the devise is for the separate use of a married woman, the legal estate vests in the trustees for her protection (*n*).

In wills before 1838, the question whether the trustees take an estate in fee simple was often one of considerable difficulty (*o*). The rules, which were subject to numerous exceptions, were the following:—

1. If a devise was made to trustees without the word "heirs," on trusts which could not be performed without their taking the fee, they took it (*p*). For example, a devise unto and the use of A. in trust for B. and his heirs, gave the legal fee to A.

2. If a devise was made to trustees, even with words of inheritance, they took only so much of the legal estate as was necessary to enable them to perform the trust (*q*). Thus if the devise was to trustees and their heirs in trust to pay the rents to A. during his life, and afterwards in trust for B., the trustees took the legal estate during A.'s life only.

3. If a devise was made to trustees without the word "heirs," on trust to raise a sum of money or debts or legacies out of the *annual* rents and profits, it was sometimes held that they took a term of years determinable when the purposes of the trust were satisfied (*r*). But this rule has been disapproved of (*s*), and it is doubtful how far it would be now followed.

4. If a devise was made to trustees "and their heirs" in trust to raise a sum of money, or debts or legacies, it was sometimes held that they took a fee simple determinable when the purposes of the trust were satisfied (*t*), but it is doubtful if this construction would now be followed (*u*).

1 Vict. c. 26.

These rules do not apply to wills after 1837, owing to the following provisions of the Wills Act:—

No devise to trustees or executors, except for a term or a presentation to a church, shall pass a chattel interest.

S. 30. "Where any real estate (other than or not being a presentation to a Church) shall be devised to any trustee or executor, such devise shall be construed to pass the fee simple or other the whole estate or interest which the testator had power to dispose of by will in such real estate, unless a definite term of

(*n*) *Harton* v. *Harton*, 7 T. R. 652.

(*o*) See Tud. L. C. R. P., notes to *Tyrrell's Case*, at p. 356; Godefroi on Trusts (2nd Edit.), ch. i., pp. 19 *et seq.*; Theobald on Wills, 324.

(*p*) *Gibson* v. *Montfort*, 1 Ves. Sen., at p. 491.

(*q*) *Doe* d. *Player* v. *Nicholls*, 1 B. & C. 336; *Watson* v. *Pearson*, 2 Ex. 581.

(*r*) *Cordall's Case*, Cro. Ell. 316; *Doe* d. *White* v. *Simpson*, 5 East. 162; *Ackland* v. *Lutley*, 9 Ad. & El. 879; 2 Man. & Gr. 973.

(*s*) *Collin* v. *McBean*, L. R. 1 Ch. 81.

(*t*) *Glover* v. *Monckton*, 3 Bing. 13.

(*u*) *Doe* d. *Davies* v. *Davies*, 1 Q. B. 430; *Blagrave* v. *Blagrave*, 4 Ex. 550; Hawk. Wills, 149.

years, absolute or determinable, or an estate of freehold, shall thereby be given to him expressly or by implication.

Trustees under an unlimited devise where the trust may endure beyond the life of a person beneficially entitled for life to take the fee.

S. 31. "Where any real estate shall be devised to a trustee without any express limitation of the estate to be taken by such trustee, and the beneficial interest in such real estate, or in the surplus rents and profits thereof, shall not be given to any person for life, or such beneficial interest shall be given to any person for life, but the purposes of the trust may continue beyond the life of such person, such devise shall be construed to vest in such trustee the fee simple, or other the whole legal estate which the testator had power to dispose of by will in such real estate, and not an estate determinable when the purposes of the trust shall be satisfied."

These clauses have been the subject of much criticism. Mr. Jarman (*v*) says:—

"It is not easy to perceive why the provision regulating the estates of trustees should have been split into two sections, and still more difficult is it to give to each of those sections such a construction as will preserve it from collision with the other. The design of section 30 would seem to be simply to negative the construction which, in certain cases, gave to a trustee an undefined term of years, for it allows him to take an estate of freehold, or a definite term of years, either expressly or by implication; but section 31 takes a wider range, as it admits of neither of these exceptions, nor that of a devise of the next presentation to a Church. Its effect is to propound, in regard to wills made or republished since the year 1837, the following general rule of construction: that whenever real estate is devised to trustees (and it would seem to be immaterial whether the devise is to the trustees indefinitely, or to them and their heirs, or to them and their executors or administrators), for purposes requiring that they should have some estate, without any specification of the nature or duration of such estate, and the beneficial interest in the property is not devised to a person for life, or being so devised, the purposes of the trust may endure beyond the life of such person, the trustees take (not, as in *Carter* v. *Barnardiston*, 1 P. W. 505, an estate for years, or as in *Doe* v. *Simpson* (5 East, 162), an estate for life, with a superadded term for years, but) an estate in fee simple. The result, in short, is that trustees, whose estate is not expressly defined by the will, must, in every case, and whatever be the nature of the duty imposed on them, take either an estate for life or an estate in fee."

Again, Mr. Hawkins says (*w*):—

"These sections have been described as obscure and even conflicting: their meaning, however, will be apprehended by observing that the 30th section, which speaks of a devise passing, 'the fee simple or other the whole estate or interest of the testator,' relates to the quantity of estate to be taken by a trustee for the purposes of the trust; while the 31st section, which declares that a devise shall vest in trustees 'the fee

(*v*) Jarman on Wills, vol. ii. 320. (*w*) Hawk. Wills, 156.

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simple or other the whole legal estate' in the premises devised, relates to the disposition of the legal estate not required for the purposes of the trust. The 30th section enacts, that in no case shall trustees or executors be held, for the purposes of the trust, to take an indefinite term of years; the 31st section enacts, that where the estate of the trustees is not expressly limited, they shall in all cases take either an estate determinable on the life of a person taking a beneficial life interest in the property, or the absolute legal estate in fee simple."

Executors.

A will is complete, as regards real estate, without the appointment of an Executor. The property vests directly in the devisee by the operation of the devise. When beneficial interests are created apart from legal ownership, the property is devised to trustees for the purpose. Most persons, however, who have realty to devise have likewise some personalty to bequeath, and it is usual in every will to appoint an executor or executors.

Liability of lands to debts of deceased owner.

At common law the heir of the deceased was liable to his debts due on bonds, covenants, or other specialties, by which the deceased had bound himself and his heirs (*x*) to the extent of the lands descended. But creditors by specialties which affect the heir, had not, at common law, any remedy against the devisee of their debtor, until it was given by statute 3 Wm. & Mary, c. 14. By 47 Geo. III. (Sess. 2) c. 74, the lands of deceased traders were made liable for payment of all their debts as well on simple contract as on specialty (whether binding the heirs or not) with a proviso that debts by specialty binding the heirs should have priority. (These Acts were consolidated and amended by 11 Geo. IV. and 1 Wm. IV. c. 47.) But in other cases, unless the deceased had by his will charged his lands with payment of his debts, which charge was effective in equity, the lands remained free, until the Act 3 & 4 Wm. IV. c. 104 made the lands of non-traders as well as of traders, not by will charged with or devised subject to the payment of the testator's debts, assets to be administered in the Courts of equity for the payment of all debts, whether on simple contract or on specialty. And this remains the remedy where there is no express or implied charge of debts in the will. Specialty debts were deprived of their priority by 32 & 33 Vict. c. 46 (*y*).

Implied charge of debts.

Questions of some nicety have arisen as to what words create an implied charge of debts, and as to what is the effect of such

(*x*) 1 Cruise Dig. 57; 2 Wms. on Exors. Pt. iv. bk. i. c. 2. 1695. See also *ante*, pp. 109 *et seq.*

(*y*) *Ante*, p. 110.

a charge. Without discussing these questions in detail (*z*), we may state the rules following:—

(1) A mere direction by the testator that his debts shall be paid charges his real estate with them (*a*).

(2) A direction by the testator that his debts shall be paid by his executors charges only the real estate, if any, devised to them (*b*).

(3) The charge of the real estate with debts does not of itself discharge the personal estate (*c*).

Charge of debts and legacies.

The question (*d*) whether, where the testator appointed executors, and also charged his real estate with payment of his debts, there was not thereby given to them by implication a power of sale to satisfy the debts, is one of considerable difficulty. In consequence, the following provisions were enacted in Lord St. Leonards' Act to further amend the Law of Property (*e*):—

22 & 23 Vict. c. 35.

Devisee in trust may raise money by sale, notwithstanding want of express power in the will.

S. 14. "Where, by any will which shall come into operation after the passing of this Act (*f*), the testator shall have charged his real estate, or any specific portion thereof, with the payment of his debts, or with the payment of any legacy or other specific sum of money, and shall have devised the estate so charged to any trustee or trustees for the whole of his estate or interest therein, and shall not have made any express provision for the raising of such debt, legacy, or sum of money out of such estate, it shall be lawful for the said devisee or devisees in trust, notwithstanding any trusts actually declared by the testator, to raise such debts, legacy, or money, as aforesaid, by a sale and absolute disposition by public auction or private contract of the said hereditaments or any part thereof, or by a mortgage of the same, or partly in one mode and partly in the other, and any deed or deeds of mortgage so executed may reserve such rate of interest, and fix such period or periods of repayment as the person or persons executing the same shall think proper (*g*).

Powers given by last section extended to survivors, devisees, &c.

S. 15. "The powers conferred by the last section shall extend to all and every person or persons in whom the estate devised shall, for the time being, be vested by survivorship, descent, or devise, or to any person or persons who may be appointed under any power in

(*z*) See Hawk. Wills, 282; Theob. Wills, 582.

(*a*) *Clifford* v. *Lewis*, 6 Mad. 33.

(*b*) *Cook* v. *Dawson*, 29 Beav. 123; 3 De G. F. & J. 127; *Re Tanqueray-Willaume and Landau*, 20 Ch. D. 465. The rule was applied to the will of a married woman in *Re De Burgh-Lawson*, 41 Ch. D. 568.

(*c*) *Tait* v. *Northwick*, 4 Ves. 823; *Ancaster* v. *Mayer*, 1 Bro. C. C. 454; *Bootle* v. *Blundell*, 1 Mer. 193.

(*d*) See this discussed in Williams on Real Assets, 77; 2 Dav. 329 (*n.*); Dart, V. & P. 693; Farwell on Powers, 57; Sugd. on Powers, 121.

(*e*) 22 & 23 Vict. c. 35.

(*f*) 13th August, 1859.

(*g*) See Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), ss. 35 and 36.

the will, or by the Court of Chancery, to succeed to the trusteeship vested in such devisee or devisees in trust as aforesaid (*h*).

Executors to have power of raising money, &c., where there is no sufficient devise.

S. 16. "If any testator, who shall have created such a charge as is described in the 14th section, shall not have devised the hereditaments charged as aforesaid in such terms as that his whole estate and interest therein shall become vested in any trustee or trustees, the executor or executors for the time being named in such will (if any) shall have the same or the like power of raising the said monies as is hereinbefore vested in the devisee or devisees in trust of the said hereditaments, and such power shall from time to time devolve to and become vested in the person or persons (if any) in whom the executorship (*i*) shall for the time being be vested; but any sale or mortgage under this Act shall operate only on the estate and interest, whether legal or equitable, of the testator, and shall not render it unnecessary to get in any outstanding subsisting legal estate.

Purchasers, &c., not bound to inquire as to powers.

S. 17. "Purchasers or mortgagees shall not be bound to inquire whether the powers conferred by sections 14, 15, and 16, of this Act, or either of them, shall have been duly and correctly exercised by the person or persons acting in virtue thereof (*k*).

Sections 14, 15, and 16, not to affect certain sales, &c., nor to extend to devises in fee or in tail.

S. 18. "The provisions contained in sections 14, 15, and 16, shall not in any way prejudice or affect any sale or mortgage already made, or hereafter to be made, under or in pursuance of any will coming into operation before the passing of this Act; but the validity of any such sale or mortgage shall be ascertained and determined in all respects as if this Act had not passed; and the said several sections shall not extend to a devise to any person or persons in fee or in tail, or for the testator's whole estate and interest charged with debts or legacies, nor shall they affect the power of any such devisee or devisees to sell or mortgage as he or they may by law now do."

As to the effect of the above enactment, it has been observed (*l*), that—

"The difficulty has been removed in two cases: 1st, by giving a devisee of the fee, who is a trustee for totally foreign purposes, a power to sell or mortgage for the satisfaction of the charge of debts; and 2ndly, by giving the executor a power to sell or mortgage when the estate is cut up by successive limitations without the intervention of a trustee of the legal fee. But in the cases where the testator died before the 13th August, 1859 (*m*), or where there is a devise, subject to the

(*h*) See Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 38.

(*i*) This does not apply to an administrator; *Re Clay and Tetley*, 16 Ch. D. 3.

(*k*) Where executors in whom the legal fee is vested by the will are selling real estate charged with debts, a purchaser is not bound or entitled to inquire whether debts remain unpaid, unless twenty years have elapsed from the testator's decease; *In re Tanqueray-Willaume and Landau*, 20 Ch. D. 465. But this rule does not in general apply to the case of an executor selling leaseholds; *Re Whistler*, 35 Ch. D. 561.

(*l*) Hayes & Jarman, 575.

(*m*) The date of the passing of the Act: 22 & 23 Vict. c. 35, s. 14.

charge of debts, to a beneficial owner in fee or in tail, or for all other the testator's interest in the estate, the Act leaves the question in the same doubt and perplexity as before."

In the case last mentioned, the executors take an equitable power of sale, and can give a discharge for the purchase-money (*n*). But the concurrence of the person in whom the legal estate is necessary in order to pass it, and the executors can compel him to concur (*o*).

Legacies.

In the absence of express provisions legacies are to be paid out of the personal estate only. But it is an old and well-established rule that, if the testator gives legacies generally, and then gives the "residue" of the real and personal estate, that charges the legacies on the residuary real estate together. The reason is that it is considered that the whole is one mass; that part of that mass is represented by legacies, and that what is afterwards given, is given *minus* what has been before given, and therefore given subject to the prior gift (*p*).

It is immaterial whether the residue is given to the executors or to another person (*q*), or whether the gift of the residue follows or precedes the gift of the legacies (*r*). The rule is even applied where a specific gift of real estate intervenes between the gift of the legacies and the gift of the residue, so that the phrase "residue of real estate" could be satisfied without assuming that the legacies were to be paid out of it.

Mr. Davidson says:

"The testator is sometimes made to direct in general terms the payment of his funeral and testamentary expenses and debts, but this is incorrect. If he mean nothing more than that they should be paid out of his personal estate, there is no occasion to direct this to be done; because it must be done by law whether he will it or not; if, on the other hand, he desires to charge his funeral and testamentary expenses and debts on some particular fund, or on his real estate, he should do so expressly, and provide the requisite machinery for effecting the intention" (*s*).

(*n*) *Forbes* v. *Peacock*, 1 Phill. 717; *Robinson* v. *Lowater*, 5 De G. M. & G. 272; *Doe* d. *Jones* v. *Hughes*, 6 Ex. 223.

(*o*) *Hodkinson* v. *Quinn*, 1 J. & H. 303. As to cases to which the Act 22 & 23 Vict. c. 35, does not apply, see Theob. Wills, 336.

(*p*) *Per* Lord Campbell, L.C., *Greville* v. *Browne*, 7 H. of L. C. at p. 697.

(*q*) *Greville* v. *Browne*, 7 H. L. C. 689; *Re Brooke*, 3 Ch. D. 630; *Bray* v. *Stevens*, 12 Ch. D. 162.

(*r*) *Elliott* v. *Dearsley*, 16 Ch. D. 322.

(*s*) 4 Dav. 3. Several forms will be found in Dav. vol. iv.; see in particular, pp. 441, 509, 558.

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Probate.

Before the Probate Act, 1857 (*t*), Ecclesiastical Courts had exclusive jurisdiction in respect to the validity and contents of wills of personalty: and probate granted by the Court (*i.e.*, a copy of the will under the seal of the Court) was conclusive evidence in this respect. But these Courts had no jurisdiction over wills of real estate. Questions as to the validity and contents of wills, so far as they dealt with real estate, were decided by the Common Law Courts; and, in such cases, the probate was not even admissible as evidence as to the validity or contents. A will relating to realty only never was and is not at the present day entitled to probate.

The Probate Act, 1857 (*t*), was passed because it was thought expedient that all jurisdiction in relation to the grant and revocation of probates of wills and letters of administration should be exercised by one Court. That Act contains the following provisions as respects proof of a will where it affects real estate and the effect of probate.

Where a Will affecting real estate is proved in solemn form, or is the subject of a contentious proceeding, the heir and persons interested in the real estate to be cited.

S. 61. "Where proceedings are taken under this Act for proving a will in solemn form, or for revoking the probate of a will, on the ground of the invalidity thereof, or where, in any other contentious cause or matter under this Act, the validity of a will is disputed, unless in the several cases aforesaid the will affects only personal estate, the heir-at-law, devisees, and other persons having or pretending interest in the real estate affected by the will shall, subject to the provisions of this Act, and to the rules and orders under this Act, be cited to see proceedings, or otherwise summoned in like manner as the next-of-kin, or others having or pretending interest in the personal estate affected by a will, should be cited or summoned, and may be permitted to become parties, or intervene for their respective interests in such real estate, subject to such rules and orders and to the discretion of the Court.

Where the Will is proved in solemn form or its validity otherwise decided on, the decree of the Court to be binding on the persons interested in the real estate.

S. 62. "Where probate of such will is granted after such proof in solemn form, or where the validity of the will is otherwise declared by the decree or order in such contentious cause or matter as aforesaid, the probate, decree, or order respectively shall enure for the benefit of all persons interested in the real estate affected by such will, and the probate copy of such will, or the letters of administration with such will annexed, or a copy thereof respectively, stamped with the seal of Her Majesty's Court of Probate, shall in all Courts, and in all suits and proceedings affecting real estate of whatever tenure (save proceedings by way of appeal under this Act, or for the revocation of such probate or administration), be received as conclusive evidence of the validity

(*t*) 20 & 21 Vict. c. 77. As to the jurisdiction of the different Divisions of the High Court to grant probate, see *per* Jessel, M.R., *Pinney* v. *Hunt*, 6 Ch. D. 98; see *Bradford* v. *Young*, 26 Ch. D 656.

and contents of such will, in like manner as a probate is received in evidence in matters relating to the personal estate; and where probate is refused or revoked, on the ground of the invalidity of the will, or the invalidity of the will is otherwise declared by decree or order under this Act, such decree or order shall enure for the benefit of the heir-at-law or other persons against whose interest in real estate such will might operate, and such will shall not be received in evidence in any suit or proceeding in relation to real estate save in any proceeding by way of appeal from such decrees or orders.

Heir, in certain cases, not to be cited, and where not cited not to be affected by probate.

S. 63. "Nothing herein contained shall make it necessary to cite the heir-at-law, or other persons having or pretending interest in the real estate of a deceased person, unless it is shown to the Court, and the Court is satisfied that the deceased was at the time of his decease seised of, or entitled to, or had power to appoint by will, some real estate beneficially, or in any case where the will propounded, or of which the validity is in question, would not, in the opinion of the Court, though established as to personalty affect real estate; but in every such case, and in any other case in which the Court may, with reference to the circumstances of the property of the deceased or otherwise, think fit, the Court may proceed without citing the heir or other persons interested in real estate; provided that the probate, decree, or order of the Court, shall not in any case affect the heir or any person in respect of his interest in real estate, unless such heir or person has been cited or made party to the proceedings, or derives title under or through a person so cited or made party.

Probate or office copy to be evidence of the Will in suits concerning real estate, save where the validity of the Will is put in issue.

S. 64. "In any action at law or suit in equity, where, according to the existing law, it would be necessary to produce and prove an original will in order to establish a devise or other testamentary disposition of or affecting real estate, it shall be lawful for the party intending to establish in proof such devise or other testamentary disposition to give to the opposite party ten days at least before the trial or other proceeding in which the said proof shall be intended to be adduced, notice that he intends at the said trial or other proceeding to give in evidence as proof of the devise or other testamentary disposition the probate of the said will, or the letters of administration with the will annexed, or a copy thereof stamped with any seal of the Court of Probate; and in every such case such probate or letters of administration, or copy thereof respectively, stamped as aforesaid, shall be sufficient evidence of such will, and of its validity and contents, notwithstanding the same may not have been proved in solemn form, or have been otherwise declared valid in a contentious cause or matter, as herein provided, unless the party receiving such notice shall, within four days after such receipt, give notice that he disputes the validity of such devise or other testamentary disposition."

The effect of s. 64 came into question in an action of ejectment by the heir against the defendant claiming as devisee under a will (*u*). Notice was given by the defendant of his intention to

(*u*) *Barraclough* v. *Greenhough*, L. R. 2 Q. B. 612.

give in evidence, as proof of the devise, the probate of the will, and the plaintiff failed to give counter-notice that he disputed the validity of the devise, and therefore at the trial he was not allowed to dispute it; on appeal, however, it was held that he was entitled to contest the validity at the trial. Martin, B., in giving the judgment of the Court, said:—

"Now, at the trial in the present case, the same effect was given to the probate in common form under this section, as would have been given to a probate after proof in solemn form under section 62, by which such probate is to be 'received as conclusive evidence of the contents and validity of the will, in like manner as probate is received in evidence in matters relating to the personal estate;' whereas, in section 64 no such language is used; on the contrary, it seems to be purposely avoided. The language of section 64 is, that the probate shall be 'sufficient evidence.' This enactment has a very useful and extensive application. It is well known in practice that it is a most expensive proceeding to produce the original will, which is in general in the custody of the Court of Probate; that Court will not trust it out of the possession of one of their officers, and the officer has often to be kept several days at the assizes. Section 64 has a most useful bearing in tending to prevent this expense. Again, it had been always necessary to produce one of the attesting witnesses, as section 26 of the Common Law Procedure Act, 1854 (*x*), only applies to cases where attestation is unnecessary; and this provision of section 64 appears to dispense with the necessity of calling either of the attesting witnesses, for the probate is to be sufficient evidence of the will, and of its validity and contents. But there is nothing in this section to lead to the conclusion that after notice the opposite party is not to be admitted to show that the testator was incapable, and the will invalid. To hold that the omission to give the counter-notice of an intention to dispute the validity of the will would have the effect of establishing a will, even if made by a lunatic in an asylum, would be carrying the language used far beyond its true meaning. The true meaning appears to be, when a notice has been given of the intention to use the probate in evidence, and the other side do not give a counter-notice within four days, the probate without more will be admissible evidence of the will and its contents as to realty, and will be *primâ facie* evidence of the validity of the will and the competence of the testator; in other words, the probate alone will be sufficient evidence to go to the jury of a devise of realty; but there is nothing to prevent the other side from showing by evidence that the will is not valid, or that the testator was not competent."

By the Judicature Act, 1873 (*y*), all causes and matters within the exclusive cognisance of the Court of Probate were assigned to the Probate, Divorce, and Admiralty Division of the High Court.

(*x*) 17 & 18 Vict. c. 125. (*y*) 36 & 37 Vict. c. 66, s. 34.

CHAPTER XVI.

STATUTES OF LIMITATION.

Principles of.

WHERE a man is wrongfully in possession of land and declines to give it up to the owner or person entitled to possess it, the latter is not allowed to take possession by force (*a*), but is put to his action. If, however, he omits to bring his action during the time prescribed by certain Statutes, called the Statutes of Limitation (*b*), he can no longer recover the land.

"It is necessary to the security of rightful possessors that they should not be molested by charges of wrongful acquisition, when by the lapse of time witnesses must have perished or been lost sight of, and the real character of the transaction can no longer be cleared up. . . . Even when the acquisition was wrongful, the dispossession, after a generation has elapsed of the probably *bonâ fide* possessors, by the revival of a claim which had been long dormant, would generally be a greater injustice, and almost always a greater private and public mischief, than leaving the original wrong without atonement" (*c*).

"The Statutes of Limitation are laws of peace and justice. When property has been so long in the possession of a family, that it has passed to the children and grandchildren of those who first acquired it, and they, unconscious of any defect of title, have formed their habits and plans of life according to the income that the property produces, it would be cruel to deprive them of it. The members of the family from which it came (never having enjoyed it) suffer but little from its loss. After a great lapse of time it is impossible to get at truth, so as to do justice upon any case. You have some documents, but you may not have all that relate to the title, and those which are lost might have explained or perhaps done away entirely the effect of those which remain. Although some documents may be preserved, the witnesses necessary to make the account of the transaction complete, and for a decision, cannot. These were the reasons why the Legislature passed the Statutes of Limitation" (*d*).

Right of entry.

At common law a claimant might have entered upon the land claimed as against a disseisor or wrongful possessor after

(*a*) 5 Ric. 2, Stat. 1, c. 8; *Edwick* v. *Hawkes*, 18 Ch. D. 199.

(*b*) "Limitation is a certain time prescribed by statute within which the demandant in the action must prove himself or one of his ancestors to be seised"; Co. Litt. 114 b.

(*c*) J. S. Mill, Polit. Econ. Bk. ii., cap. ii. s. 2.

(*d*) *White* v. *Parnther*, Knapp, 227; and see *Dundee Harbour Trustees* v. *Dougall*, 1 Macq., H. L. C. 321; *Dalton* v. *Angus*, 6 App. Cas. at p. 818, per Lord Blackburn.

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any length of time, provided the disseisor or wrongful possessor had not died, in which case it was said that the descent "tolled,"—*i.e.*, took away—the right of entry. The Statute 21 Jac. I. c. 16, took away the remedy by entry at the expiration of twenty years; and this period, therefore, applied to the action of ejectment (*e*). But even where the remedy by entry was barred, the right of the true owner might remain enforceable by a real action or writ of right. At common law, the demandant, *i.e.*, plaintiff, in a writ of right could not recover unless he could prove that he or one of his ancestors had seisin in or since the reign of Henry I. This time was altered by the Statute of Merton (20 Hen. III. c. 8) to the reign of Henry II., and by the Statute of Westminster I. (3 Ed. I. c. 39) to the reign of Richard I.; and, ultimately, by 32 Hen. VIII. c. 2), to the period of sixty years before the *teste* of the writ (*f*). By 4 Hen. VII. c. 24, the right of the true owner might also be barred by a fine with proclamations, if the title was not asserted within five years after the proclamations made; but, as we have seen, fines have been abolished (*g*), and real actions or writs of right, except ejectment and certain others above referred to (*h*), were abolished by 3 & 4 Wm. IV. c. 27.

Writ of right.

The Statutes of Limitation which were in force before 1834, only extinguished the remedy of the person out of possession; they did not transfer the right to the land to the person in possession, but the Acts now in force actually transfer the right (*i*). Under the old Acts the question sometimes arose whether the possession of the person in possession was "adverse" to the title of the right of the true owner, and if it was not, it did not bar him of his remedy. It is very difficult to say what amounted to "adverse" possession (*j*). Under the statutes now in force the doctrine of adverse possession has been done away with, and under the present law the question to be considered (in the absence of fraud (*k*)) is, whether the person in possession has been in possession for the time mentioned in the Acts (*l*).

(*e*) See 2 Wms. Saund. 175, note (2).

(*f*) As to the old law, see Co. Litt. 114 b, *et seq.*; 2 Coke's Rep. by Fraser, 274, note; 3 Cruise, Dig. 430, *et seq.*; Shelford, R. P. Stat. 146; *Angus* v. *Dalton*, 3 Q. B. D. 85, at p. 103, per Cockburn, C. J.

(*g*) *Ante*, p. 68.

(*h*) *Ante*, p. 7.

(*i*) 3 & 4 Wm. IV. c. 27, s. 34; see 2 Sm. L. C. 798; *Doe* d. *Jukes* v. *Sumner*, 14 M. & W. 39.

(*j*) See *Nepean* v. *Doe*, 2 Sm. L. C. 610; 2 M. & W. 894.

(*k*) See *post*, p. 409.

(*l*) *Rains* v. *Buxton*, 14 Ch. D. 537.

There must be both absence of possession by the person who has the right, and actual possession by another, whether adverse or not, to bring the case within the Statute (*m*).

3 & 4 Wm. IV. c. 27.

The "Act for the Limitation of Actions and Suits relating to Real Property, and for simplifying the remedies for trying the rights thereto" (*n*) (hereinafter called the Act of 1833), as amended by 3 & 4 Wm. IV. c. 42, and the Real Property Limitation Act, 1874 (*o*) (hereinafter called the Act of 1874), are the statutes now in force.

These Acts apply to land and rent (*p*), ecclesiastical property and advowsons (*q*), moneys secured by any mortgage, judgment or lien, or otherwise charged upon or payable out of any land or rent (*r*), and arrears of rent or interest in respect of any sum of money charged upon or payable out of any land or rent (*s*).

Suits in equity were required to be brought within the same time as actions at law (*t*), subject to special provisions as to land or rent vested in a trustee upon an express trust (*u*).

Concealed fraud.

But in every case of "concealed fraud" the period of limitation does not begin to run until the fraud is, or with reasonable diligence might have been, first known or discovered (*x*); and in

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(*m*) *Per* Parke, B., *Smith* v. *Lloyd*, 9 Exch. 562 (where mere non-user for more than forty years of a right to get minerals was held no bar to the right); see *Agency Company* v. *Short*, 13 App. Cas. 793, at p. 799.

(*n*) 3 & 4 Wm. IV. c. 27.

(*o*) 37 & 38 Vict. c. 57.

(*p*) 3 & 4 Wm. IV. c. 27, s. 2; 37 & 38 Vict. c. 57, s. 1.

(*q*) 3 & 4 Wm. IV. c. 27, ss. 29—33. As to the principle of s. 29, see *Ecclesiastical Commissioners* v. *Rowe*, 5 App. Cas. 736, at p. 744.

(*r*) *Ib.*, s. 40; 37 & 38 Vict. c. 57, s. 8.

(*s*) 3 & 4 Wm. IV. c. 27, s. 42, *i.e.*, as against the land; but as to the personal remedy on a covenant to pay rent, see 3 & 4 Wm. IV. c. 42, s. 3; and *post*, p. 420.

(*t*) 3 & 4 Wm. IV. c. 27, s. 24.

(*u*) *Ib.*, s. 25. See *Patrick* v. *Simpson*, 24 Q. B. D. 128, as to what is an "express trust." As to sums of money or legacies charged upon land and secured by an express trust, see 37 & 38 Vict. c. 57, s. 10; *Hughes* v. *Coles*, 27 Ch. D. 231; *Re Stephens*, 43 Ch. D. 39. And see the Trustee Act, 1888 (51 & 52 Vict. c. 59), s. 8, which enables trustees to take advantage of Statutes of Limitations, *except* (inter alia) "where the claim is to recover trust property."

(*x*) 3 & 4 Wm. IV. c. 27, s. 26; *Rains* v. *Buxton*, 14 Ch. D. 537; *Willis* v. *Howe*, 29 W. R. 70; *Lawrance* v. *Lord Norreys*, 15 App. Cas. 210 (as to what the plaintiff who sets up concealed fraud must prove, and as to how it is to be pleaded); "'Concealed fraud' does not mean the case of a party entering wrongfully into possession; it means a case of designed fraud, by which a party, knowing to whom the right belongs, conceals the circumstances giving that right, and by means of such concealment enables himself to enter and hold," per Kindersley, V.-C., *Petre* v. *Petre*, 1 Drewry, 397. See *Cheetham* v. *Hoare*, L. R. 9 Eq. 571, and *Vane* v. *Vane*, L. R. 8 Ch. 383, on

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Disabilities.

the case of disability to sue, arising from infancy, coverture, idiotcy, lunacy or unsoundness of mind, a period is allowed which runs from the cesser of the disability (*y*).

Crown. 9 Geo. III. c. 16. 24 & 25 Vict. c. 62.

The old Statutes of Limitation did not apply to the Crown, for at common law the maxim is, *nullum tempus occurrit regi;* but by the *Nullum Tempus* Act (*z*), the rights of the Crown as regards lands and rents are barred after the lapse of sixty years.

The Act of 1833 (3 & 4 Wm. IV. c. 27) provides that:—

"Land" defined.

"Rent" defined.

(S. 1.) "The word 'land' shall extend to manors, messuages, and all other corporeal hereditaments whatsoever, and also to tithes (other than tithes belonging to a spiritual or eleemosynarycorporation sole), and also to any share, estate or interest in them or any of them, whether the same shall be a freehold or chattel interest, and whether freehold or copyhold, or held according to any other tenure; and the word 'rent' shall extend to all heriots (*a*) and to all services and suits for which a distress may be made (*b*), and to all annuities and periodical sums of money charged upon or payable out of any land (except moduses or compositions (*c*) belonging to a spiritual or eleemosynary corporation sole)."

The word "land" as thus defined does not include incorporeal hereditaments, except such parts of a manor as are incorporeal, and tithes not belonging to the specified corporations (*d*).

Tithes.

At common law mere non-payment of tithes for any length of time did not render the land tithe free unless a legal origin for the exemption could be shown (*e*). This was remedied by 2 & 3 Wm. IV. c. 100; and it has been decided that the provisions of that Act are not affected by 3 & 4 Wm. IV. c. 27, and that the word "tithes," so far as tithes are included under the word "land" in that Act, means an estate in the tithes (*f*). The Commutation of tithes has rendered this question of but little importance. Tithe rentcharge is "rent" within the meaning of the Act (*g*).

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the proviso protecting a *bonâ fide* purchaser in cases of concealed fraud, *i.e.*, a person who is really a purchaser, and not a mere donee taking a gift under the form of a purchase.

(*y*) *Post*, p. 415.

(*z*) 9 Geo. III., c. 16, amended by 24 & 25 Vict. c. 62.

(*a*) As to the application of the Act to heriots, see *Owen* v. *De Beauvoir*, 16 M. & W. 547; *Zouche* v. *Dalbiac*, L. R. 10 Ex. 172.

(*b*) Co. Litt. 150 b.

(*c*) 2 Bl. 29; 2nd Instit. 490.

(*d*) *Irish Land Commission* v. *Grant*, 10 App. Cas. 14.

(*e*) *Salkeld* v. *Johnson*, 1 Mac. & Gor. 242. See the cases collected in *Payne* v. *Esdaile*, 13 App. Cas. 613. As to how land can become tithe free, see *ante*, p. 342.

(*f*) *Dean of Ely* v. *Cash*, 15 M. & W. 617; *Dean of Ely* v. *Bliss*, 2 De G. M. & G. 459.

(*g*) *Irish Land Commission* v. *Grant*, 10 App. Cas. 14; see per Selborne, C., at p. 30.

It should be observed that the right to land may be extinguished by the effect of the statute though the owner is not aware that another person has acquired possession (*h*).

It has been held in a case in the Privy Council that time does not continue to run against the owner of the land after a person who has wrongfully gone into possession relinquishes it before he has acquired a title by statute (*i*).

"Rent."

The word "rent" is used in two different senses in the Act of 1833 (3 & 4 Wm. IV. c. 27),—viz., (1) in the sense of a rent charged upon land, or otherwise existing as a separate incorporeal hereditament; and (2) in the sense of a rent reserved under a lease. In the 2nd section, it is used in the first sense only, *i.e.*, as meaning a rentcharge (*k*).

Grant v. *Ellis*

Thus in *Grant* v. *Ellis* (*l*) it was held that, in ss. 2 & 3 of the Act, the word "rent" does not refer to rents reserved on leases for years by contract between the parties, but is confined to rents existing as an inheritance distinct from the land, such as ancient rents-service, fee-farm rents, or the like (*m*), and that therefore a person entitled to the reversion expectant on the determination of a lease for years may distrain for the rent thereby reserved at any time during the existence of the lease, although no payment of rent has been made for more than the period of limitation (*n*). The reasons for this decision were thus given by Rolfe, B.:—

"In order to come to a just conclusion as to the meaning of the word 'rent' as used in the two sections (*o*) to which we have referred, it is important first to consider what is the meaning of the word 'recover,' (any land or rent, but within twenty years, &c.). Now, so far as relates to land, the word 'recover,' in this passage, clearly means the same thing as 'obtain possession or seisin of.' The clause assumes one party to be in wrongful seisin or possession of land to which another has the right, and then limits the time within which the right must be asserted.

"If such be the meaning of the word 'recover,' when used with reference to one of its objects—'land,' it is very reasonable to suppose that the Legislature intended it to have the same meaning in respect to the other object—'rent.' It is true, indeed, that with respect to an incorporeal hereditament like rent there cannot be strictly any wrongful adverse

(*h*) *Rains* v. *Buxton*, 14 Ch. D. 537.

(*i*) *Agency Co.* v. *Short*, 13 Ap. Ca. 793. See this discussed, 5 L. Q. R. 185.

(*k*) See per Denman, C.J., *Doe* d. *Angell* v. *Angell*, 9 Q. B. 328.

(*l*) 9 M. & W. 113.

(*m*) See as to the effect of the Statute on rents of this nature, Darby and Bos, 208 *et seq.*; *Owen* v. *De Beauvoir*, 16 M. & W. 547; 5 Ex. 166; *Chichester* v. *Hall*, 17 L. T. 121; *Zouche* v. *Dalbiac*, L. R. 10 Ex. 172.

(*n*) *Grant* v. *Ellis*, 9 M. & W. 113.

(*o*) 3 & 4 Wm. IV. c. 27, ss. 2 and 3.

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seisin or possession by another. If A. claims and receives the rent due to B., B. has still the same right against the *terre*-tenant (*p*) as if no payment had been made to A. The receipt of rent by A. is not inconsistent with a similar receipt by B., as the possession of land by A. is necessarily inconsistent with possession of the same land by B. But still, before the passing of this Act, a party seised of rents, whether rent-service, rent-charges, or rent-seck, might, in case the rent was paid to another or withheld from him, consider himself, if he thought fit, as being disseised of such rent. And a party electing to consider himself so disseised, might have the same remedy by an assize to recover seisin of his rent, as a party disseised of land might have to recover seisin of his land. The judgment in each case was the same, '*quod recuperet seisinam*'; and in each case the party was entitled to a writ of *habere facias seisinam*, which in case of a recovery of rent, was executed by the sheriff delivering to the plaintiff an ox or other chattel on the land, in lieu of execution; and in case of a subsequent withholding of rent, the party aggrieved might have his writ of re-disseisin, with all its consequences, as in the case of a subsequent disseisin of lands or houses.

"Now we are of opinion, that it is to this sort of recovery only that the second section of the statute has reference; for such is clearly the meaning of the word 'recover,' when used with reference to land; and the plain grammatical construction requires us to give it the same meaning when applied to rent, unless, which is not the case here, some manifest absurdity or inconvenience should result from our so doing. It follows from hence, as a matter of course, that the word 'rent' in the second section, must necessarily be confined to rent which might in its nature have been the object of such a recovery; and this certainly does not include the rent reserved on common leases for years."

Limitation as to land or rent.

The period within which a person may make an entry or distress or bring an action to recover land or rent (*i.e.*, rent in the first of the two senses above pointed out) is twelve years from the time at which the right to do so first accrued to the person claiming the land or rent, or to some person through whom he claims (*q*), that is, "any person by, through, or under or by the act of whom, the person so claiming became entitled to the estate or interest claimed" (*r*).

Time from which the period of limitation runs.

As to land or rent.

The time at which the right first accrues in various cases is defined by the 3rd and following sections of 3 & 4 Wm. IV. c. 27, and s. 2 of 37 & 38 Vict. c. 57: the general principle being "that, when a person has been in possession or receipt of the profits of land, or in receipt of a rent (*s*), the right accrued at the time when

(*p*) *I.e.*, the owner of the land on which the rent is charged or out of which it issues.

(*q*) 37 & 38 Vict. c. 57, s. 1 (substituted as from 31 Dec., 1878, for 3 & 4 Wm. IV. c. 27, s. 2, under which the period was twenty years).

(*r*) 3 & 4 Wm. IV. c. 27, s. 1.

(*s*) *E.g.*, an ancient quit-rent; *Owen* v. *De Beauvoir*, 16 M. & W. 547; 5 Exch. 166.

he ceased to hold such possession, or receive such profits or rent; while, in the case of a person who has never had such possession or receipt, the right accrued at the time when he first became entitled (whether by descent, alienation, falling in of a remainder or reversion, forfeiture, devise, or otherwise) to enter into such possession or receipt" (*t*).

Future estate.

As to an estate or interest in reversion or remainder or other future estate or interest, the right to recover "land or rent" in general accrues when it becomes an estate or interest in possession by the determination of the prior particular estate: but if the person last entitled to the particular estate was not in possession when his interest determined, the right of the owner of the future estate to recover is barred at the end of twelve years from the time when the right to recover accrued to the owner of the particular estate, *or* at the end of six years from the time when the future estate vested in possession, whichever of those two periods shall be the longer (*u*). That is to say, if the owner of the particular estate was out of possession for six years or upwards, the period of limitation will be six years after the determination of his estate; if he was out of possession for less than six years, the owner of the future estate may recover within a period of twelve years after the particular estate determined less the period during which the owner of the particular estate was out of possession (*x*).

Mortgagee in possession.

We have already pointed out (*y*) that the right of a mortgagor to redeem as against a mortgagee who has taken possession is barred at the end of twelve years from the time at which the mortgagee took possession or from the latest acknowledgment by the mortgagee of the mortgagor's right; and that a mortgagee not in possession is allowed, as against the mortgagor, to recover the land within a period of twelve years from the last payment of any part of the principal or interest under the mortgage (*z*).

(*t*) Dart, V. & P. 435.

(*u*) 37 & 38 Vict. c. 57, s. 2, substituted for 3 & 4 Wm. IV. c. 27, s. 5.

(*x*) See *Pedder* v. *Hunt*, 18 Q. B. D. 565, where it was held that the section applies only where the owner of the particular estate had a right to the possession, and was therefore inapplicable where the owner of a prior life estate had alienated his estate and so created an estate *pur autre vie* and therefore ceased to have a right to the possession.

(*y*) *Ante*, p. 193; 3 & 4 Wm. IV. c. 27, s. 28; 37 & 38 Vict. c. 57, s. 7. In this case there is no saving for the disability of the mortgagor; *Forster* v. *Patterson*, 17 Ch. D. 132; and the mortgagor may be barred where the mortgagee has been in possession of part only of the mortgaged land, so far as respects that part; *Kinsman* v. *Rouse*, 17 Ch. D. 104.

(*z*) *Ante*, p. 193; 7 Wm. IV. & 1

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Payment taking case out of statute.

It may be added that the payment, to take the case out of the statute, must be made by some person who as between mortgagor and mortgagee is liable to pay in satisfaction of the mortgage debt: and therefore a payment of rent to the mortgagee without the knowledge of the mortgagor is not a payment within the statutes, for the underlying principle of all the Statutes of Limitation is that a payment, to take a case out of the statute, must be a payment by a person liable, as an acknowledgment of right (*a*).

Effect of foreclosure.

If a mortgagee, whether legal or equitable, who has never been in possession, and to whom there has been no payment of principal or interest, commences an action for foreclosure within the period of limitation (now twelve years) and obtains judgment for foreclosure absolute (even after the expiration of the period of limitation), he may maintain an action to recover possession of the land within the period of limitation reckoned from the time of the foreclosure absolute, which gives a new right to recover possession (*b*).

Acknowledgment.

It is provided by the Act of 1833 (*c*) that "when any acknowledgment of the title of the person entitled to any land or rent shall have been given to him or his agent, in writing, signed by the person in possession or in receipt of the profits of such land, or in receipt of such rent, then" time begins to run against the person to whom or to whose agent the acknowledgment is made from the time of the acknowledgment.

It should be observed that the writing must be signed by the person in possession; an acknowledgment by his agent is not sufficient (*d*), and it must be made to the person entitled, or to his agent, not to a stranger (*e*); but no particular form of acknowledgment is necessary (*f*).

Extinguished title not revived by

When a title has once been extinguished by the statute, no

Vict. c. 28; 37 & 38 Vict. c. 57, s. 9. The former statute is confined to "land" as defined by 3 & 4 Wm. IV. c. 27 (s. 1), and therefore does not apply to mortgages of rent-charges. See Darby & Bos, 354.

(*a*) *Harlock* v. *Ashberry*, 19 Ch. D. 539, per Jessel, M.R. See *Newbould* v. *Smith*, 29 Ch. D. 882; 33 Ch. D. 127, discussed in 31 Sol. Journ. 228.

(*b*) *Pugh* v. *Heath*, 7 App. Cas. 235, affirming *Heath* v. *Pugh*, 6 Q. B. D. 345.

(*c*) 3 & 4 Wm. IV. c. 27, s. 14.

(*d*) *Ley* v. *Peter*, 3 H. & N. 101.

(*e*) *Fursden* v. *Clogg*, 10 M. & W. 572. An acknowledgment contained in an answer in Chancery, in a suit in which the person entitled was plaintiff, was held sufficient. *Goode* v. *Job*, 1 E. & E. 6.

(*f*) *Incorporated Society* v. *Richards*, 1 Dru. & War. 258; *Fursden* v. *Clogg*, 10 M. & W. 572; *Goode* v. *Job*, 1 E. & E. 6.

acknowledgment or payment of rent by the person who has acquired title under the statute can restore the old title (*g*).

subsequent acknowledgment.

Provision is made by the Act of 1874 (*h*) for the case of persons under the disabilities of "infancy, coverture, lunacy or unsoundness of mind." In these cases, notwithstanding that the period of limitation may have expired, a further period of six years is allowed from the time when the disability ceases or the person under disability dies. But an extreme period of limitation, viz., thirty years, is fixed in cases of disability, after which the right is barred although the person whose right is thus barred was under disability during the whole of such thirty years (*i*).

Disabilities.

By the Married Women's Property Act, 1882 (*k*), a married woman is capable "of suing and being sued either in contract or in tort or otherwise" as if she were a *feme sole*. The result appears to be that as regards the separate property of a married woman, whether it be constituted such by the provisions of some settlement, will, or other instrument, or be statutory separate estate under the Act, the disability of coverture is done away with.

Married Women.

Where the right of a tenant in tail is extinguished by the Statute, the rights of all persons whom he might have barred (under the Fines and Recoveries Act) are also extinguished (*l*); and where part of the period of limitation has run against a deceased tenant in tail, such part is reckoned as against all persons whom the deceased tenant in tail might have barred, so that any such person has only the same period allowed him as the deceased would have had if he had continued to live (*m*) (and that, notwithstanding that such person was under disability when his estate fell into possession): that is to say, the act of the tenant in tail in allowing any portion of the statutory period to run without making an entry or bringing an action, to the extent of the period allowed to lapse, binds the remainderman (*n*).

Tenants in tail.

Where a tenant in tail makes an assurance which does not bar

Base fee.

(*g*) *Re Alison*, 11 Ch. D. 284; *Sanders* v. *Sanders*, 19 Ch. D. 373.

(*h*) 37 & 38 Vict. c. 57, s. 3. By the (repealed) provisions of the Act of 1833 (3 & 4 Wm. IV. c. 27, s. 16), a period of ten years was allowed, and absence beyond seas was a disability.

(*i*) 37 & 38 Vict. c. 57, s. 5, replacing 3 & 4 Wm. IV. c. 27, s. 17, under which the extreme period was forty years.

(*k*) 45 & 46 Vict. c. 75, s. 1 (e).

(*l*) 3 & 4 Wm. IV. c. 27, s. 21.

(*m*) *Ib.*, s. 22.

(*n*) See *Goodall* v. *Skerratt*, 3 Dr. 216; 1 Jur. N. S. 57.

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the remainders, as for instance, where A. being remainderman in tail, executes a disentailing deed under 3 & 4 Wm. IV., c. 74 (*o*), which, for want of the protector's consent creates only a base fee (*p*), the period of limitation begins to run, as against persons entitled to estates in remainder subsequent to the estate tail of A., as from the time at which A. or his issue could, without the consent of any third person, have barred these remainders (*q*).

Express trusts.

The Act of 1833 (*r*) provides that when land or rent is vested in a trustee on an express trust, time shall begin to run against the *cestui que trust* at the time when the land or rent is conveyed to a purchaser for a valuable consideration, and then only as against such purchaser and any person claiming through him. The purchaser here intended is a purchaser who takes with notice of the trust; such a purchaser will have a good title after the lapse of the statutory period of limitation (*s*), but not until then (*t*). But if a purchaser for value have no notice of the trust, he obtains a good title by the conveyance to him of the legal estate as against the *cestui que trust* (*u*); on the general principle of equity as to purchase for value without notice. The provision of the Act as to express trusts is merely declaratory of the rule of equity in force before the Act: for where the relation of trustee and *cestui que trust* exists, the possession of the trustee was always considered to be that of the *cestui que trust*, and no lapse of time enabled the trustee to claim the land as against his *cestui que trust* merely on the ground of having been continuously in possession.

"Express trust" defined.

"Express" trust means a trust which has been expressed either by writing or by word of mouth, and not a trust which arises from the acts of the parties or operation of law, *i.e.*, a resulting, implied, or constructive trust (*x*). Where the trust is merely constructive, *i.e.*, where a person not being the trustee appointed by an instrument, has come into possession under such circumstances that a Court would consider him to be trustee, the

(*o*) *Ante*, p. 69.

(*p*) *Ante*, p. 70.

(*q*) 37 & 38 Vict. c. 57, s. 6 (replacing 3 & 4 Wm. IV. c. 27, s. 23); see *Penny* v. *Allen*, 7 De G. M. & G. at 426.

(*r*) 3 & 4 Wm. IV. c. 27, s. 25.

(*s*) *Pyrah* v. *Woodcock*, 24 L. T. N. S. 407; and so in cases of charitable trusts, *Magdalen Coll.* v. *Att.-Gen.*, 6 H. L. C. 189.

(*t*) See *Petre* v. *Petre*, 1 Drew. 371, 397.

(*u*) *Mansell* v. *Mansell*, 2 P. Wms. 678, at p. 681; *Att.-Gen.* v. *Flint*, 4 Hare, 147, 155, 156; Lewin on Trusts, 876; *ante*, p. 282. And so in cases of charitable trusts, *Att.-Gen.* v. *Wilkins*, 17 Beav. 285.

(*x*) Per Fry, J., *Sands to Thompson* 22 Ch. D. 614, 617.

25th section of the statute does not apply(*z*); therefore a constructive trustee may set up the statute against the person who but for the lapse of time would be the rightful owner (*a*).

The law as regards the claim of a *cestui que trust* against his trustee is, in accordance with the previous rule in equity (*b*), declared by the Judicature Act, 1873 (*c*), by which it is enacted that:—

> S. 25, § 2. "No claim of a *cestui que trust* against his trustee for any property held on an express trust, or in respect of any breach of such trust, shall be held to be barred by any Statute of Limitations."

An exception, noticed below (*d*), to the provisions as to express trusts has, however, been constituted by the Real Property Limitation Act, 1874, in respect of sums of money or legacies charged on land or rent.

Lessor and lessee.

The periods of limitation as between lessor and lessee for years are regulated by the 7th, 8th and 9th sections of the Act of 1833 (3 & 4 Wm. IV., c. 27). The 7th section, which we shall not discuss, applies to tenancies at will (*e*). The 8th section provides that when a person is in possession of any land, or in receipt of the profits of any land, or in receipt of any rent (*i.e.*, rentcharge), as tenant from year to year, *without any lease in writing*, time is to run against the reversioner (landlord) from the expiration of the first year or from the last time when rent (*i.e.*, rent reserved out of the land or rentcharge which is the subject of the lease) is received, which shall last happen (*f*).

It should be observed that the word "rent" is used in two different meanings in this section; where a person is spoken of as in receipt of any "rent" as tenant, the word means a rent of inheritance (*g*); but in the latter part of the section, where receipt

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(*z*) *Dickenson* v. *Teasdale*, 1 De G. J. & S. 52; *Cunningham* v. *Foot*, 3 App. Cas. 974; *Sands to Thompson*, 22 Ch. D. 614. But where a testator devised his realty to his executors on trust, and omitted to declare trusts of all his realty, it was held that there was an express trust for his heir-at-law; *Patrick* v. *Simpson*, 24 Q. B. D. 128.

(*a*) *Petre* v. *Petre*, 1 Drew. 393.

(*b*) See 2 Spence's Equity, p. 248.

(*c*) 36 & 37 Vict. c. 66, s. 25, § 2.

(*d*) *Post*, p. 420.

(*e*) See *Mayor of Brighton* v. *Guardians of Brighton*, 5 C. P. D. 368; *Sands to Thompson*, 22 Ch. D. 614, where a mortgage was paid off, the mortgagor being in possession, but no reconveyance was made.

(*f*) *Lyell* v. *Kennedy*, 18 Q. B. D. 796; 14 App. Cas. 439. As to tenancy from year to year, see *ante*, p. 146.

(*g*) See definition of rent in s. 1 of the Act.

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of rent is spoken of, rent means the rent reserved on the tenancy (*h*).

The phrase "lease in writing" in this section means an instrumeent which operats as a lease, *i.e.*, which passes an interest to the lessee. An instrument which passes no interest is not a lease, although it may bind the lessee (*i*).

Mere non-payment of the rent reserved by a lease, for however long a time during the term, will not bar the reversioner: if no rent has been paid to a third person, his right to recover the land will be enforceable on the determination of the lease though no rent has been paid to him under it (*k*). But the 9th section (*l*) of the Act of 1833 (3 & 4 Wm. 4, c. 27), provides that when a person is in possession under a lease *in writing* at a rent of 20*s*. or upwards, and the rent is received by a person wrongfully claiming the reversion, and no rent is afterwards paid to the person rightfully entitled to the reversion, the right of the latter "to make an entry or distress or to bring an action after the determination of the lease" is to be deemed to have accrued at the time of the first payment of the rent to the wrongful claimant; and in such cases of wrongful payment no such right is to be deemed to have first accrued upon the determination of the lease.

Wrongful receipt of rent reserved by lease.

It should be observed that neither section 8 nor section 9 applies to the case of a lease in writing at a rent less than 20*s*. In such cases no payment of rent to the wrong person will prevent the rightful reversioner from bringing his action at the end of the term. In cases to which section 9 applies, time begins to run against the reversioner from the time when the first payment of rent was wrongfully made (*m*).

Void leases.

If a lease is void, time begins to run against the reversioner from the date of the lease (or rather the date when the intended lessee enters), or the last payment of rent, whichever is later (*n*).

Money charged on land.

As to charges upon land, the Act of 1874 (37 & 38 Vict. c. 57) provides (*o*) that:—

(*h*) See *Doe* d. *Angell* v. *Angell*, 6 Q. B. 328.

(*i*) *Doe* d. *Lansdell* v. *Gower*, 17 Q. B. 589.

(*k*) *Archbold* v. *Scully*, 9 H. L. C. 360; *Doe* v. *Oxenham*, 7 M. & W. 131.

(*l*) The word "rent" is used in this ection in the two different senses above noticed; see *ante*, p. 411, and *Doe* d. *Angell* v. *Angell*, 9 Q. B. 328 as to the mode in which the section is to be read.

(*m*) *Chadwick* v. *Broadwood*, 3 Bear. 308.

(*n*) *Magdalen Hospital* v. *Knotts*, 4 App. Cas. 324; *Webster* v. *Southey*, 36 Ch. D. 9.

(*o*) S. 8, substituted for s. 40 of 3 &

"No action or suit or other proceeding shall be brought to recover any sum of money secured by any mortgage, judgment (*p*), or lien, or otherwise charged upon or payable out of any land or rent, at law or in equity, or any legacy (*q*), but within twelve years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same, unless in the meantime some part of the principal money, or some interest thereon, shall have been paid, or some acknowledgment of the right thereto shall have been given in writing signed by the person by whom the same shall be payable, or his agent, to the person entitled thereto or his agent; and, in such case, no such action or suit or proceeding shall be brought but within twelve years after such payment or acknowledgment, or the last of such payments or acknowledgments, if more than one, was given."

In cases within this section the limitation applies to the personal remedy on the covenant in a mortgage deed as well as to the remedy against the land (*r*), and to an action on a collateral bond whereby the mortgage debt is secured (*s*).

It will be observed that under this section time begins to run from the concurrence of two events: the money must be payable, and there must be some person capable of giving a discharge for it.

In the case of a legacy time begins to run from the expiration of twelve months after the death of the testator, unless some other time is mentioned in the will, or unless, if the legacy is charged on land, the subsistence of prior charges prevents the legatee from claiming payment of his legacy (*t*). It has been held that the provisions of the section extend to legacies not charged on land (*x*).

Any annuity charged on land by will is "rent" within the meaning of the Act and therefore does not fall under this section (*y*).

Although the section does not expressly give any allowance of time in the case of disabilities, it practically does so by the words "some person capable of giving a discharge for or release of the same," as unless there is such a person the section does not apply.

Where the same person has to pay and receive interest, time

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4 Wm. 4, c. 27, under which the period of limitation was twenty years.

(*p*) See *Ex parte Tynte*, 15 Ch. D. 125; *Evans* v. *O'Donnell*, 18 L. R. Ir. 170; Elph. & Cl. Searches, 50.

(*q*) Whether charged on land or not.

(*r*) *Sutton* v. *Sutton*, 22 Ch. D. 511.

(*s*) *Fearnside* v. *Flint*, 22 Ch. D. 579.

(*t*) *Faulkner* v. *Daniel*, 3 Ha. 199 at p. 212.

(*x*) *Bullock* v. *Downes*, 9 H. L. C. at 14; *Sheppard* v. *Duke*, 9 Sim. 567.

(*y*) *Hughes* v. *Coles*, 27 Ch. D. 231.

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does not run against him, and this was held to be so in a case where the rents which he received were at law payable to one set of trustees for him and the interest which he retained was at law payable to another set of trustees for him (*z*).

Charges secured by express trust.

By the Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57, s. 10), sums of money or legacies (and arrears of interest thereon) charged on land and secured by an express trust are recoverable only within the same period as if there were no such trust (*a*).

Arrears of rent or interest.

By the Act 3 & 4 Wm. 4, c. 27, it was provided (*b*) that "no arrears of rent or of interest in respect of any sum of money charged upon or payable out of any land or rent" (*c*), should be "recovered by any distress, action, or suit, but within six years next after the same respectively shall have become due," or a similar acknowledgment was given. The statute 3 & 4 Wm. 4, c. 42, passed a few weeks later, contained a provision (*d*) that "all actions of debt for rent upon an indenture of demise, all actions of covenant or debt upon any bond or other specialty," &c., should be commenced within twenty years after the cause of action. The difficulty of reconciling these enactments has been solved by decisions that an action for arrears of rent upon the covenant to pay in an indenture of lease might be brought within the time limited by the later Act (*e*); but that, in a suit in equity for the purpose of establishing an annuity charged on the lands, secured also by the personal covenant of the grantor, the earlier Act applied, and only six years' arrears could be recovered (*f*). It was held (*g*) that s. 42 of the Act 3 & 4 Wm. 4, c. 27, was applicable only to the land, and s. 3 of the Act 3 & 4 Wm. 4, c. 42, was applicable only to the person: the combined effect of the two enactments being that no more than six years' arrears of rent or interest in respect of any sum charged upon or payable

(*z*) *Topham* v. *Booth*, 35 Ch. D. 607.

(*a*) See *Hughes* v. *Coles*, 27 Ch. D. 231.

(*b*) 3 & 4 Wm. IV., c. 27, s. 42. As to capitalized interest, see *Clarkson* v. *Henderson*, 14 Ch. D. 348.

(*c*) This includes both a rent which is an incorporeal hereditament and rent reserved on a lease; Darby & Bos, 137; and also a gross sum of money charged on land and payable by annual instalments; *Uppington* v. *Tarrant*, 12 Ir. Ch. R. 262, and an annuity charged on land; *Hughes* v. *Coles*, 27 Ch. D. 232.

(*d*) 3 & 4 Wm. IV. c. 42, s. 3.

(*e*) *Paget* v. *Foley*, 2 Bing. N. C. 679.

(*f*) *Hunter* v. *Nockolds*, 1 Mac. & G. 640; see *Darley* v. *Tennant*, 53 L. T. 257.

(*g*) *Hunter* v. *Nockolds*, 1 Mac. & G. at p. 652, per Lord Cottenham, C.

out of any land or rent could be recovered by any distress, action, or suit, except in actions upon covenant or debt upon specialty, in which case the limitation would be twenty years.

Acquiescence. Jurisdiction of equity. (3 & 4 Wm. IV. c. 27 : 37 & 38 Vict. c. 57.)

The jurisdiction of equity to refuse relief, notwithstanding that the period of limitation has not elapsed, is thus saved by the Statute 3 & 4 Wm. 4, c. 27 :—

> S. 27. "Nothing in this Act contained shall be deemed to interfere with any rule or jurisdiction of Courts of Equity in refusing relief on the ground of Acquiescence or otherwise to any person whose right to bring a suit may not be barred by virtue of this Act" (*h*).

As to the doctrine of Acquiescence, Mr. Dart (*i*) says :—

"Mere lapse of time, except where it is a statutory or positive bar to relief, is only evidence of acquiescence : but a *cestui que trust* wishing to impeach a sale must do so within a reasonable time ; which, as a matter of fact, is generally less than the time allowed by the Statute of Limitations : though, independently of statutory limitation, no positive limit of time can be imposed, and each case must be governed by its own circumstances. A delay of eighteen years has been held to be an implied confirmation of the transaction ; ten and eleven years have been allowed in the case of an individual ; and twelve in the case of creditors : but the general tendency of modern decisions and of recent legislation is to increasingly discourage stale demands : and where there are other circumstances, showing acquiescence, beyond the mere lapse of time, a short delay will be a sufficient bar to relief. A longer time, however, is allowed to a class of persons, *e.g.* creditors, than would be allowed to an individual."

The difference between "acquiescence" and simple "*laches*" has been thus expressed by Lord Wensleydale :—

"Where there is a Statute of Limitations, the objection of simple *laches* does not apply until the expiration of the time allowed by the statute. But acquiescence is a different thing, it means more than *laches*. If a party who could object lies by, and knowingly permits another to incur an expense in doing an act under the belief that it would not be objected to, and so a kind of permission may be said to be given to another to alter his condition, he may be said to acquiesce : but the fact of simply neglecting to enforce a claim for the period during which the law permits him to delay without losing his right, I conceive cannot be any equitable bar" (*k*).

Pleading.

By the Rules of the Supreme Court, Statutes of Limitation are

(*h*) This section remains in force and is to be read with 37 & 38 Vict. c. 57 ; see s. 9.

(*i*) Dart, V. & P., 54.

(*k*) Per Lord Wensleydale, *Archbold* v. *Scully*, 9 H. L. C. 383. See also *In re Baker*, 20 Ch. D. 230 ; *In re Maddever*, 27 Ch. D. 523 ; and as to proof of acquiescence, *In re Marsden*, 26 Ch. D. 790, *per* Kay, J.

Chap. XVI. required to be expressly pleaded (*l*); but the defence may be raised by way of demurrer (*m*) in cases in which, as in the Real Property Limitation Statutes, the statute operates to extinguish the title and not merely to bar the remedy of the plaintiff (*n*).

(*l*) R. S. C., Ord. xix., rule 15.

(*m*) Now demurrers are abolished, the defence will be raised by the proceedings in lieu of demurrer: R. S. C., Ord. xxv., see rule 2.

(*n*) See *Dawkins* v. *Lord Penrhyn*, 4 App. Cas. 51.

ACTS IN APPENDIX.

THE VENDOR AND PURCHASER ACT, 1874
[37 & 38 VICT. C. 78.]

THE CONVEYANCING AND LAW OF PROPERTY ACT, 1881
[44 & 45 VICT. C. 41.]

THE CONVEYANCING ACT, 1882
[45 & 46 VICT. C. 39.]

THE SETTLED LAND ACT, 1882
[45 & 46 VICT. C. 38.]

THE SETTLED LAND ACT, 1884
[47 & 48 VICT. C. 18.]

THE SETTLED LAND ACTS AMENDMENT ACT, 1887
[50 & 51 VICT. C. 30].

THE SETTLED LAND ACT, 1889
[52 & 53 VICT. C. 36.]

THE SETTLED LAND ACT, 1890
[53 & 54 VICT. C. 69.]

THE MARRIED WOMEN'S PROPERTY ACT, 1882
[45 & 46 VICT. C. 75.]

APPENDIX.

THE VENDOR AND PURCHASER ACT, 1874.

37 & 38 Vict. c. 78.

[37 & 38 VICT. CH. 78.]

An Act to amend the Law of Vendor and Purchaser and further to simplify title to Land. [7th August, 1874.]

WHEREAS it is expedient to facilitate the transfer of land by means of certain amendments in the law of vendor and purchaser:

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Forty years substituted for sixty years as the root of title.

1. In the completion of any contract of sale of land made after the thirty-first day of December one thousand eight hundred and seventy-four, and subject to any stipulation to the contrary in the contract, forty years shall be substituted as the period of commencement of title which a purchaser may require in place of sixty years, the present period of such commencement; nevertheless earlier title than forty years may be required in cases similar to those in which earlier title than sixty years may be now required.

Rules for regulating obligations and rights of vendor and purchaser.

2. In the completion of any such contract as aforesaid, and subject to any stipulation to the contrary in the contract, the obligations and rights of vendor and purchaser shall be regulated by the following rules; that is to say,

First. Under a contract to grant or assign a term of years, whether derived, or to be derived out of a freehold or leasehold estate, the intended lessee or assign shall not be entitled to call for the title to the freehold.

Second. Recitals, statements, and descriptions of facts, matters, and parties contained in deeds, instruments, Acts of Parliament, or statutory declarations, twenty years old at the date of the contract, shall, unless and except so far as they shall he proved to be inaccurate, be taken to be sufficient evidence of the truth of such facts, matters, and descriptions.

Third. The inability of the vendor to furnish the purchaser with a legal covenant to produce and furnish copies of documents of title shall not be an objection to title in case the purchaser will, on the completion of the contract, have an equitable right to the production of such documents.

37 & 38 Vict. c. 78.

Fourth. Such covenants for production as the purchaser can and shall require shall be furnished at his expense, and the vendor shall bear the expense of perusal and execution on behalf of and by himself, and on behalf of and by necessary parties other than the purchaser.

Fifth. Where the vendor retains any part of an estate to which any documents of title relate he shall be entitled to retain such documents.

Trustees may sell, &c., notwithstanding rules.

3. Trustees who are either vendors or purchasers may sell or buy without excluding the application of the second section of this Act.

Legal personal representative may convey legal estate of mortgaged property.

4 (*a*). *The legal personal representative of a mortgagee of a freehold estate, or of a copyhold estate to which the mortgagee shall have been admitted, may, on payment of all sums secured by the mortgage, convey or surrender the mortgaged estate, whether the mortgage be in form an assurance subject to redemption, or an assurance upon trust.*

Bare legal estate in fee simple to vest in executor or administrator.

5 (*b*). *Upon the death of a bare trustee of any corporeal or incorporeal hereditament of which such trustee was seised in fee simple, such hereditament shall vest like a chattel real in the legal personal representative from time to time of such trustee.*

Married woman who is a bare trustee may convey, &c.

6. When any freehold or copyhold hereditament shall be vested in a married woman as a bare trustee, she may convey or surrender the same as if she were a feme sole.

Protection and priority by legal estates and tacking not to be allowed.

7 (*c*). *After the commencement of this Act, no priority or protection shall be given or allowed to any estate, right, or interest in land by reason of such estate, right, or interest being protected by or tacked to any legal or other estate or interest in such land; and full effect shall be given in every court to this provision, although the person claiming such priority or protection as aforesaid shall claim as a purchaser for valuable consideration and without notice: Provided always, that this section shall not take away from any estate, right, title, or interest any priority or protection which but for this section would have been given or allowed thereto as against any estate or interest existing before the commencement of this Act.*

Non-registration of will in Middlesex, &c., cured in certain cases.

8. Where the will of a testator devising land in Middlesex or Yorkshire has not been registered within the period allowed by law in that behalf, an assurance of such land to a purchaser or mortgagee by the devisee or by some one deriving title under him shall, if registered before, take precedence of and prevail over any assurance from the testator's heir-at-law.

Vendor or purchaser may

9. A vendor or purchaser of real or leasehold estate in England, or

(*a*) Repealed as to deaths happening after 1881 by the C. A. 1881, s. 30.

(*b*) Repealed and partially re-enacted by the Land Transfer Act, 1875 (38 & 39 Vic. c. 87, s. 48), which was repealed as to deaths happening since 1881 by C. A. 1881, s. 30.

(*c*) Repealed by the Land Transfer Act, 1875, s. 129.

their representatives respectively, may at any time or times and from time to time apply in a summary way to a judge of the Court of Chancery in England in Chambers, in respect of any requisitions or objections, or any claim for compensation, or any other question arising out of or connected with the contract (not being a question affecting the existence or validity of the contract), and the judge shall make such order upon the application as to him shall appear just, and shall order how and by whom all or any of the costs of and incident to the application shall be borne and paid.

37 & 38 Vict. c. 78.

obtain decision of judge in chambers as to requisitions or objections, or compensation, &c.

A vendor or purchaser of real or leasehold estate in Ireland, or their representatives respectively, may in like manner and for the same purpose apply to a judge of the Court of Chancery in Ireland, and the judge shall make such order upon the application as to him shall appear just, and shall order how and by whom all or any of the costs of and incident to the application shall be borne and paid.

10. This Act shall not apply to Scotland, and may be cited as the Vendor and Purchaser Act, 1874.

Extent of Act.

CONVEYANCING AND LAW OF PROPERTY ACT, 1881.

44 & 45 Vict. c. 41.

[44 & 45 VICT. CH. 41.]

An Act for simplifying and improving the practice of Conveyancing; and for vesting in Trustees, Mortgagees, and others various powers commonly conferred by provisions inserted in Settlements, Mortgages, Wills, and other Instruments; and for amending in various particulars the Law of Property; and for other purposes.

[22nd August, 1881.]

BE it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

I.—PRELIMINARY.

1.—(1.) This Act may be cited as the Conveyancing and Law of Property Act, 1881.

Short title; commencement; extent.

(2.) This Act shall commence and take effect from and immediately after the thirty-first day of December one thousand eight hundred and eighty-one.

44 & 45 Vict. c. 41.

Interpretation of property, land, &c.

(3.) This Act does not extend to Scotland.

2. In this Act—

(i.) Property, unless a contrary intention appears, includes real and personal property, and any estate or interest in any property, real or personal, and any debt, and any thing in action, and any other right or interest:

(ii.) Land, unless a contrary intention appears, includes land of any tenure, and tenements and hereditaments, corporeal or incorporeal, and houses and other buildings, also an undivided share in land:

(iii.) In relation to land, income includes rents and profits, and possession includes receipt of income:

(iv.) Manor includes lordship, and reputed manor or lordship:

(v.) Conveyance, unless a contrary intention appears, includes assignment, appointment, lease, settlement, and other assurance, and covenant to surrender, made by deed, on a sale, mortgage, demise, or settlement of any property, or on any other dealing with or for any property; and convey, unless a contrary intention appears, has a meaning corresponding with that of conveyance:

(vi.) Mortgage includes any charge on any property for securing money or money's worth; and mortgage money means money, or money's worth, secured by a mortgage; and mortgagor includes any person from time to time deriving title under the original mortgagor, or entitled to redeem a mortgage, according to his estate, interest, or right, in the mortgaged property; and mortgagee includes any person from time to time deriving title under the original mortgagee; and mortgagee in possession is, for the purposes of this Act, a mortgagee who, in right of the mortgage, has entered into and is in possession of the mortgaged property:

(vii.) Incumbrance includes a mortgage in fee, or for a less estate, and a trust for securing money, and a lien, and a charge of a portion, annuity, or other capital or annual sum; and incumbrancer has a meaning corresponding with that of incumbrance, and includes every person entitled to the benefit of an incumbrance, or to require payment or discharge thereof:

(viii.) Purchaser, unless a contrary intention appears, includes a lessee or mortgagee, and an intending purchaser, lessee, or mortgagee, or other person, who, for valuable consideration, takes or deals for any property; and purchase, unless a contrary intention appears, has a meaning corresponding with that of purchaser; but sale means only a sale properly so called:

(ix.) Rent includes yearly or other rent, toll, duty, royalty, or other reservation, by the acre, the ton, or otherwise; and fine includes premium or fore-gift, and any payment, consideration, or benefit in the nature of a fine, premium, or fore-gift:

(x.) Building purposes include the erecting and the improving of,

and the adding to, and the repairing of buildings; and a building lease is a lease for building purposes or purposes connected therewith: 44 & 45 Vict. c. 41.

(xi.) A mining lease is a lease for mining purposes, that is, the searching for, winning, working, getting, making merchantable, carrying away, or disposing of mines and minerals, or purposes connected therewith, and includes a grant or licence for mining purposes:

(xii.) Will includes codicil:

(xiii.) Instrument includes deed, will, inclosure award, and Act of Parliament:

(xiv.) Securities include stocks, funds, and shares:

(xv.) Bankruptcy includes liquidation by arrangement, and any other act or proceeding in law having, under any Act for the time being in force, effects or results similar to those of bankruptcy; and bankrupt has a meaning corresponding with that of bankruptcy:

(xvi.) Writing includes print; and words referring to any instrument, copy, extract, abstract, or other document, include any such instrument, copy, extract, abstract, or other document being in writing or in print, or partly in writing and partly in print:

(xvii.) Person includes a corporation:

(xviii.) Her Majesty's High Court of Justice is referred to as the Court.

II.—Sales and other Transactions.

Contracts for Sale.

Application of stated conditions of sale to all purchases.

3.—(1.) Under a contract to sell and assign a term of years derived out of a leasehold interest in land, the intended assign shall not have the right to call for the title to the leasehold reversion.

(2.) Where land of copyhold or customary tenure has been converted into freehold by enfranchisement, then, under a contract to sell and convey the freehold, the purchaser shall not have the right to call for the title to make the enfranchisement.

(3.) A purchaser of any property shall not require the production, or any abstract or copy, of any deed, will, or other document, dated or made before the time prescribed by law, or stipulated, for commencement of the title, even though the same creates a power subsequently exercised by an instrument abstracted in the abstract furnished to the purchaser; nor shall he require any information, or make any requisition, objection or inquiry, with respect to any such deed, will, or document, or the title prior to that time, notwithstanding that any such deed, will, or other document, or that prior title, is recited, covenanted to be produced, or noticed; and he shall assume, unless the contrary appears, that the recitals, contained in the abstracted instruments, of any deed, will, or other document, forming part of that prior title, are correct, and give all the material contents of the deed, will, or

44 & 45 Vict. c. 41.

other document so recited, and that every document so recited was duly executed by all necessary parties, and perfected, if and as required, by fine, recovery, acknowledgment, inrolment, or otherwise.

(4.) Where land sold is held by lease (not including under-lease), the purchaser shall assume, unless the contrary appears, that the lease was duly granted; and, on production of the receipt for the last payment due for rent under the lease before the date of actual completion of the purchase, he shall assume, unless the contrary appears, that all the covenants and provisions of the lease have been duly performed and observed up to the date of actual completion of the purchase.

(5.) Where land sold is held by under-lease, the purchaser shall assume, unless the contrary appears, that the under-lease and every superior lease were duly granted; and, on production of the receipt for the last payment due for rent under the under-lease before the date of actual completion of the purchase, he shall assume, unless the contrary appears, that all the covenants and provisions of the under-lease have been duly performed and observed up to the date of actual completion of the purchase, and further that all rent due under every superior lease, and all the covenants and provisions of every superior lease, have been paid and duly performed and observed up to that date.

(6.) On a sale of any property, the expenses of the production and inspection of all Acts of Parliament, inclosure awards, records, proceedings of courts, court rolls, deeds, wills, probates, letters of administration, and other documents, not in the vendor's possession, and the expenses of all journeys incidental to such production or inspection, and the expenses of searching for, procuring, making, verifying, and producing all certificates, declarations, evidences, and information not in the vendor's possession, and all attested, stamped, office, or other copies or abstracts of, or extracts from, any Acts of Parliament or other documents aforesaid, not in the vendor's possession, if any such production, inspection, journey, search, procuring, making, or verifying is required by a purchaser, either for verification of the abstract, or for any other purpose, shall be borne by the purchaser who requires the same; and where the vendor retains possession of any document, the expenses of making any copy thereof, attested or unattested, which a purchaser requires to be delivered to him, shall be borne by that purchaser.

(7.) On a sale of any property in lots, a purchaser of two or more lots, held wholly or partly under the same title, shall not have a right to more than one abstract of the common title, except at his own expense.

(8.) This section applies only to titles and purchasers on sales properly so called, notwithstanding any interpretation in this Act.

(9.) This section applies only if and as far as a contrary intention is not expressed in the contract of sale, and shall have effect subject to the terms of the contract and to the provisions therein contained.

(10.) This section applies only to sales made after the commencement of this Act.

(11.) Nothing in this section shall be construed as binding a purchaser to complete his purchase in any case where, on a contract made independently of this section, and containing stipulations similar to the provisions of this section, or any of them, specific performance of the contract would not be enforced against him by the Court.

Completion of contract after death.

4.—(1.) Where at the death of any person there is subsisting a contract enforceable against his heir or devisee, for the sale of the fee simple or other freehold interest, descendible to his heirs general, in any land, his personal representatives shall, by virtue of this Act, have power to convey the land for all the estate and interest vested in him at his death, in any manner proper for giving effect to the contract.

(2.) A conveyance made under this section shall not affect the beneficial rights of any person claiming under any testamentary disposition or as heir or next of kin of a testator or intestate.

(3.) This section applies only in cases of death after the commencement of this Act.

Discharge of Incumbrances on Sale.

Provision by Court for incumbrances, and sale freed therefrom.

5.—(1.) Where land subject to any incumbrance, whether immediately payable or not, is sold by the Court, or out of Court, the Court may, if it thinks fit, on the application of any party to the sale, direct or allow payment into Court, in case of an annual sum charged on the land, or of a capital sum charged on a determinable interest in the land, of such amount as, when invested in Government securities, the Court considers will be sufficient, by means of the dividends thereof, to keep down or otherwise provide for that charge, and in any other case of capital money charged on the land, of the amount sufficient to meet the incumbrance and any interest due thereon; but in either case there shall also be paid into Court such additional amount as the Court considers will be sufficient to meet the contingency of further costs, expenses, and interest, and any other contingency, except depreciation of investments, not exceeding one-tenth part of the original amount to be paid in, unless the Court for special reason thinks fit to require a larger additional amount.

(2.) Thereupon, the Court may, if it thinks fit, and either after or without any notice to the incumbrancer, as the Court thinks fit, declare the land to be freed from the incumbrance, and make any order for conveyance, or vesting order, proper for giving effect to the sale, and give directions for the retention and investment of the money in Court.

(3.) After notice served on the persons interested in or entitled to the money or fund in Court, the Court may direct payment or transfer

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thereof to the persons entitled to receive or give a discharge for the same, and generally may give directions respecting the application or distribution of the capital or income thereof.

(4.) This section applies to sales not completed at the commencement of this Act, and to sales thereafter made.

General Words.

General words in conveyances of land, buildings, or manor.

6.—(1.) A conveyance of land shall be deemed to include and shall by virtue of this Act operate to convey, with the land, all buildings, erections, fixtures, commons, hedges, ditches, fences, ways, waters, watercourses, liberties, privileges, easements, rights, and advantages whatsoever, appertaining or reputed to appertain to the land, or any part thereof, or at the time of conveyance demised, occupied, or enjoyed with, or reputed or known as part or parcel of or appurtenant to the land or any part thereof.

(2.) A conveyance of land, having houses or other buildings thereon, shall be deemed to include and shall by virtue of this Act operate to convey, with the land, houses, or other buildings, all outhouses, erections, fixtures, cellars, areas, courts, courtyards, cisterns, sewers, gutters, drains, ways, passages, lights, watercourses, liberties, privileges, easements, rights, and advantages whatsoever, appertaining or reputed to appertain to the land, houses, or other buildings conveyed, or any of them, or any part thereof, or at the time of conveyance demised, occupied, or enjoyed with, or reputed or known as part or parcel of or appurtenant to, the land, houses, or other buildings conveyed, or any of them, or any part thereof.

(3.) A conveyance of a manor shall be deemed to include and shall by virtue of this Act operate to convey, with the manor, all pastures, feedings, wastes, warrens, commons, mines, minerals, quarries, furzes, trees, woods, underwoods, coppices, and the ground and soil thereof, fishings, fisheries, fowlings, courts leet, courts baron, and other courts, view of frankpledge and all that to view of frankpledge doth belong, mills, mulctures, customs, tolls, duties, reliefs, heriots, fines, sums of money, amerciaments, waifs, estrays, chief-rents, quit-rents, rentscharge, rents seck, rents of assize, fee farm rents, services, royalties, jurisdictions, franchises, liberties, privileges, easements, profits, advantages, rights, emoluments, and hereditaments whatsoever, to the manor appertaining or reputed to appertain, or at the time of conveyance demised, occupied, or enjoyed with the same, or reputed or known as part, parcel, or member thereof.

(4.) This section applies only if and as far as a contrary intention is not expressed in the conveyance, and shall have effect subject to the terms of the conveyance and to the provisions therein contained.

(5.) This section shall not be construed as giving to any person a better title to any property, right, or thing in this section mentioned

than the title which the conveyance gives to him to the land or manor expressed to be conveyed, or as conveying to him any property, right, or thing in this section mentioned, further or otherwise than as the same could have been conveyed to him by the conveying parties.

(6.) This section applies only to conveyances made after the commencement of this Act.

Covenants for Title.

Covenants for title to be implied.

7.—(1.) In a conveyance there shall, in the several cases in this section mentioned, be deemed to be included, and there shall in those several cases, by virtue of this Act, be implied, a covenant to the effect in this section stated, by the person or by each person who conveys, as far as regards the subject-matter or share of subject-matter expressed to be conveyed by him, with the person, if one, to whom the conveyance is made, or with the persons jointly, if more than one, to whom the conveyance is made as joint tenants, or with each of the persons, if more than one, to whom the conveyance is made as tenants in common, that is to say:

On conveyance for value, by beneficial owner.

(A.) In a conveyance for valuable consideration, other than a mortgage, the following covenant by a person who conveys and is expressed to convey as beneficial owner (namely):

Right to convey.

That, notwithstanding anything by the person who so conveys, or any one through whom he derives title, otherwise than by purchase for value, made, done, executed, or omitted, or knowingly suffered, the person who so conveys has, with the concurrence of every other person, if any, conveying by his direction, full power to convey the subject-matter expressed to be conveyed, subject as, if so expressed, and in the manner in which it is expressed to be conveyed, and that, notwithstanding anything as aforesaid, that subject-matter shall remain to and be quietly entered upon, received, and held, occupied, enjoyed, and taken, by the person to whom the conveyance is expressed to be made, and any person deriving title under him, and the benefit thereof shall be received and taken accordingly, without any lawful interruption or disturbance by the person who so conveys or any person conveying by his direction, or rightfully claiming or to claim by, through, under, or in trust for the person who so conveys, or any person conveying by his direction, or by, through, or under any one not being a person claiming in respect of an estate or interest subject whereto the conveyance is expressly made, through whom the person who so conveys derives title, otherwise than by purchase for value; and that, freed and discharged from, or otherwise by the person who so conveys sufficiently indemnified against, all such estates, incumbrances, claims, and demands other than those subject to which the conveyance is expressly made, as either before or after the date of the convey-

Quiet enjoyment.

Freedom from incumbrance.

44 & 45 Vict. c. 41.

ance have been or shall be made, occasioned, or suffered by that person or by any person conveying by his direction, or by any person rightfully claiming by, through, under, or in trust for the person who so conveys, or by, through, or under any person conveying by his direction, or by, through, or under any one through whom the person who so conveys derives title, otherwise than by purchase for value; and further, that the person who so conveys, and any person conveying by his direction, and every other person having or rightfully claiming any estate or interest in the subject-matter of conveyance, other than an estate or interest subject whereto the conveyance is expressly made, by, through, under, or in trust for the person who so conveys, or by, through, or under any person conveying by his direction, or by, through, or under any one through whom the person who so conveys derives title, otherwise than by purchase for value, will, from time to time and at all times after the date of the conveyance, on the request and at the cost of any person to whom the conveyance is expressed to be made, or of any person deriving title under him, execute and do all such lawful assurances and things for further or more perfectly assuring the subject-matter of the conveyance to the person to whom the conveyance is made, and to those deriving title under him, subject as, if so expressed, and in the manner in which the conveyance is expressed to be made, as by him or them or any of them shall be reasonably required:

Further assurance.

(in which covenant a purchase for value shall not be deemed to include a conveyance in consideration of marriage):

On conveyance of leaseholds for value, by beneficial owner.

(B.) In a conveyance of leasehold property for valuable consideration, other than a mortgage, the following further covenant by a person who conveys and is expressed to convey as beneficial owner (namely):

Validity of lease.

That, notwithstanding anything by the person who so conveys, or any one through whom he derives title otherwise than by purchase for value, made, done, executed, or omitted, or knowingly suffered, the lease or grant creating the term or estate for which the land is conveyed is, at the time of conveyance, a good, valid, and effectual lease or grant of the property conveyed, and is in full force, unforfeited, unsurrendered, and in nowise become void or voidable, and that, notwithstanding anything as aforesaid, all the rents reserved by, and all the covenants, conditions, and agreements contained in, the lease or grant, and on the part of the lessee or grantee and the persons deriving title under him to be paid, observed, and performed, have been paid, observed, and performed up to the time of conveyance:

(in which covenant a purchase for value shall not be deemed to include a conveyance in consideration of marriage):

(C.) In a conveyance by way of mortgage, the following covenant by a person who conveys and is expressed to convey as beneficial owner (namely):

On mortgage, by beneficial owner.

That the person who so conveys, has, with the concurrence of every other person, if any, conveying by his direction, full power to convey the subject-matter expressed to be conveyed by him, subject as, if so expressed, and in the manner in which it is expressed to be conveyed; and also that, if default is made in payment of the money intended to be secured by the conveyance, or any interest thereon, or any part of that money or interest, contrary to any provision in the conveyance, it shall be lawful for the person to whom the conveyance is expressed to be made, and the persons deriving title under him, to enter into and upon, or receive, and thenceforth quietly hold, occupy, and enjoy or take and have, the subject-matter expressed to be conveyed, or any part thereof, without any lawful interruption or disturbance by the person who so conveys, or any person conveying by his direction, or any other person not being a person claiming in respect of an estate or interest subject whereto the conveyance is expressly made; and that, freed and discharged from, or otherwise by the person who so conveys sufficiently indemnified against, all estates, incumbrances, claims, and demands whatever, other than those subject whereto the conveyance is expressly made; and further, that the person who so conveys and every person conveying by his direction, and every person deriving title under any of them, and every other person having or rightfully claiming any estate or interest in the subject-matter of conveyance, or any part thereof, other than an estate or interest subject whereto the conveyance is expressly made, will from time to time and at all times, on the request of any person to whom the conveyance is expressed to be made, or of any person deriving title under him, but, as long as any right of redemption exists under the conveyance, at the cost of the person so conveying, or of those deriving title under him, and afterwards at the cost of the person making the request, execute and do all such lawful assurances and things for further or more perfectly assuring the subject-matter of conveyance and every part thereof to the person to whom the conveyance is made, and to those deriving title under him, subject as, if so expressed, and in the manner in which the conveyance is expressed to be made, as by him or them or any of them shall be reasonably required:

Right to convey.

Quiet enjoyment.

Freedom from incumbrance.

Further assurance.

(D.) In a conveyance by way of mortgage of leasehold property, the following further covenant by a person who conveys and is expressed to convey as beneficial owner (namely):

On mortgage of leaseholds, by beneficial owner.

That the lease or grant creating the term or estate for which the land is held is, at the time of conveyance, a good, valid, and effectual

Validity of lease.

44 & 45 Vict. c. 41.

lease or grant of the land conveyed and is in full force, unforfeited, and unsurrendered and in nowise become void or voidable, and that all the rents reserved by, and all the covenants, conditions, and agreements contained in, the lease or grant, and on the part of the lessee or grantee and the persons deriving title under him to be paid, observed, and performed, have been paid, observed, and performed up to the time of conveyance; and also that the person so conveying, or the persons deriving title under him, will at all times, as long as any money remains on the security of the conveyance, pay, observe, and perform, or cause to be paid, observed, and performed all the rents reserved by, and all the covenants, conditions, and agreements contained in, the lease or grant, and on the part of the lessee or grantee and the persons deriving title under him to be paid, observed, and performed, and will keep the person to whom the conveyance is made, and those deriving title under him, indemnified against all actions, proceedings, costs, charges, damages, claims and demands, if any, to be incurred or sustained by him or them by reason of the non-payment of such rent or the non-observance or non-performance of such covenants, conditions, and agreements, or any of them:

Payment of rent and performance of covenants.

On settlement.

(E.) In a conveyance by way of settlement, the following covenant by a person who conveys and is expressed to convey as settlor (namely):

For further assurance, limited.

That a person so conveying, and every person deriving title under him by deed or act or operation of law in his lifetime subsequent to that conveyance, or by testamentary disposition or devolution in law, on his death, will, from time to time, and at all times, after the date of that conveyance, at the request and cost of any person deriving title thereunder, execute and do all such lawful assurances and things for further or more perfectly assuring the subject-matter of the conveyance to the persons to whom the conveyance is made and those deriving title under them, subject as, if so expressed, and in the manner in which the conveyance is expressed to be made, as by them or any of them shall be reasonably required:

On conveyance by trustee or mortgagee.

(F.) In any conveyance, the following covenant by every person who conveys and is expressed to convey as trustee or mortgagee, or as personal representative of a deceased person, or as committee of a lunatic so found by inquisition, or under an order of the Court, which covenant shall be deemed to extend to every such person's own acts only (namely):

Against incumbrances.

That the person so conveying has not executed or done, or knowingly suffered, or been party or privy to, any deed or thing, whereby or by means whereof the subject-matter of the conveyance, or any part thereof, is or may be impeached, charged, affected, or incumbered in title, estate, or otherwise, or whereby or by means

whereof the person who so conveys is in anywise hindered from conveying the subject-matter of the conveyance, or any part thereof, in the manner in which it is expressed to be conveyed.

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(2.) Where in a conveyance it is expressed that by direction of a person expressed to direct as beneficial owner another person conveys, then, within this section, the person giving the direction, whether he conveys and is expressed to convey as beneficial owner or not, shall be deemed to convey and to be expressed to convey as beneficial owner the subject-matter so conveyed by his direction; and a covenant on his part shall be implied accordingly.

(3.) Where a wife conveys and is expressed to convey as beneficial owner, and the husband also conveys and is expressed to convey as beneficial owner, then, within this section, the wife shall be deemed to convey and to be expressed to convey by direction of the husband, as beneficial owner; and, in addition to the covenant implied on the part of the wife, there shall also be implied, first, a covenant on the part of the husband as the person giving that direction, and secondly, a covenant on the part of the husband in the same terms as the covenant implied on the part of the wife.

(4.) Where in a conveyance a person conveying is not expressed to convey as beneficial owner, or as settlor, or as trustee, or as mortgagee, or as personal representative of a deceased person, or as committee of a lunatic so found by inquisition, or under an order of the Court, or by direction of a person as beneficial owner, no covenant on the part of the person conveying shall be, by virtue of this section, implied in the conveyance.

(5.) In this section a conveyance includes a deed conferring the right to admittance to copyhold or customary land, but does not include a demise by way of lease at a rent, or any customary assurance, other than a deed, conferring the right to admittance to copyhold or customary land.

(6.) The benefit of a covenant implied as aforesaid shall be annexed and incident to, and shall go with, the estate or interest of the implied covenantee, and shall be capable of being enforced by every person in whom that estate or interest is, for the whole or any part thereof, from time to time vested.

(7.) A covenant implied as aforesaid may be varied or extended by deed, and, as so varied or extended, shall, as far as may be, operate in the like manner, and with all the like incidents, effects, and consequences, as if such variations or extensions were directed in this section to be implied.

(8.) This section applies only to conveyances made after the commencement of this Act.

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Execution of Purchase Deed.

Rights of purchaser as to execution.

8.—(1.) On a sale, the purchaser shall not be entitled to require that the conveyance to him be executed in his presence, or in that of his solicitor, as such; but shall be entitled to have, at his own cost, the execution of the conveyance attested by some person appointed by him, who may, if he thinks fit, be his solicitor.

(2.) This section applies only to sales made after the commencement of this Act.

Production and Safe Custody of Title-Deeds.

Acknowledgment of right to production, and undertaking for safe custody of documents.

9.—(1.) Where a person retains possession of documents, and gives to another an acknowledgment in writing of the right of that other to production of those documents, and to delivery of copies thereof (in this section called an acknowledgment), that acknowledgment shall have effect as in this section provided.

(2.) An acknowledgment shall bind the documents to which it relates in the possession or under the control of the person who retains them, and in the possession or under the control of every other person having possession or control thereof from time to time, but shall bind each individual possessor or person as long only as he has possession or control thereof; and every person so having possession or control from time to time shall be bound specifically to perform the obligations imposed under this section by an acknowledgment, unless prevented from so doing by fire or other inevitable accident.

(3.) The obligations imposed under this section by an acknowledgment are to be performed from time to time at the request in writing of the person to whom an acknowledgment is given, or of any person, not being a lessee at a rent, having or claiming any estate, interest, or right through or under that person, or otherwise becoming through or under that person interested in or affected by the terms of any document to which the acknowledgment relates.

(4.) The obligations imposed under this section by an acknowledgment are—

(i.) An obligation to produce the documents or any of them at all reasonable times for the purpose of inspection, and of comparison with abstracts or copies thereof, by the person entitled to request production or by any one by him authorised in writing; and

(ii.) An obligation to produce the documents or any of them at any trial, hearing, or examination in any Court, or in the execution of any commission, or elsewhere in the United Kingdom, on any occasion on which production may properly be required, for proving or supporting the title or claim of the person entitled to request production, or for any other purpose relative to that title or claim; and

(iii.) An obligation to deliver to the person entitled to request the same true copies or extracts, attested or unattested, of or from the documents or any of them.

(5.) All costs and expenses of or incidental to the specific performance of any obligation imposed under this section by an acknowledgment shall be paid by the person requesting performance.

(6.) An acknowledgment shall not confer any right to damages for loss or destruction of, or injury to, the documents to which it relates, from whatever cause arising.

(7.) Any person claiming to be entitled to the benefit of an acknowledgment may apply to the Court for an order directing the production of the documents to which it relates, or any of them, or the delivery of copies of or extracts from those documents or any of them to him, or some person on his behalf; and the Court may, if it thinks fit, order production, or production and delivery, accordingly, and may give directions respecting the time, place, terms, and mode of production or delivery, and may make such order as it thinks fit respecting the costs of the application, or any other matter connected with the application.

(8.) An acknowledgment shall by virtue of this Act satisfy any liability to give a covenant for production and delivery of copies of or extracts from documents.

(9.) Where a person retains possession of documents and gives to another an undertaking in writing for safe custody thereof, that undertaking shall impose on the person giving it, and on every person having possession or control of the documents from time to time, but on each individual possessor or person as long only as he has possession or control thereof, an obligation to keep the documents safe, whole, uncancelled, and undefaced, unless prevented from so doing by fire or other inevitable accident.

(10.) Any person claiming to be entitled to the benefit of such an undertaking may apply to the Court to assess damages for any loss, destruction of, or injury to the documents or any of them, and the Court may, if it thinks fit, direct an inquiry respecting the amount of damage, and order payment thereof by the person liable, and may make such order as it thinks fit respecting the costs of the application, or any other matter connected with the application.

(11.) An undertaking for safe custody of documents shall by virtue of this Act satisfy any liability to give a covenant for safe custody of documents.

(12.) The rights conferred by an acknowledgment or an undertaking under this section shall be in addition to all such other rights relative to the production, or inspection, or the obtaining of copies of documents as are not, by virtue of this Act, satisfied by the giving of the acknowledgment or undertaking, and shall have effect subject to the terms

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of the acknowledgment or undertaking, and to any provisions therein contained.

(13.) This section applies only if and as far as a contrary intention is not expressed in the acknowledgment or undertaking.

(14.) This section applies only to an acknowledgment or undertaking given, or a liability respecting documents incurred, after the commencement of this Act.

III.—Leases.

Rent and benefit of lessees' covenants to run with reversion.

10.—(1.) Rent reserved by a lease, and the benefit of every covenant or provision therein contained, having reference to the subject-matter thereof, and on the lessee's part to be observed or performed, and every condition of re-entry and other condition therein contained, shall be annexed and incident to and shall go with the reversionary estate in the land, or in any part thereof, immediately expectant on the term granted by the lease, notwithstanding severance of that reversionary estate, and shall be capable of being recovered, received, enforced, and taken advantage of by the person from time to time entitled, subject to the term, to the income of the whole or any part, as the case may require, of the land leased.

(2.) This section applies only to leases made after the commencement of this Act.

Obligation of lessor's covenants to run with reversion.

11.—(1.) The obligation of a covenant entered into by a lessor with reference to the subject-matter of the lease shall, if and as far as the lessor has power to bind the reversionary estate immediately expectant on the term granted by the lease, be annexed and incident to and shall go with that reversionary estate, or the several parts thereof, notwithstanding severance of that reversionary estate, and may be taken advantage of and enforced by the person in whom the term is from time to time vested by conveyance, devolution in law, or otherwise; and, if and as far as the lessor has power to bind the person from time to time entitled to that reversionary estate, the obligation aforesaid may be taken advantage of and enforced against any person so entitled.

(2.) This section applies only to leases made after the commencement of this Act.

Apportionment of conditions on severance, &c.

12.—(1.) Notwithstanding the severance by conveyance, surrender, or otherwise, of the reversionary estate in any land comprised in a lease, and notwithstanding the avoidance or cesser in any other manner of the term granted by a lease as to part only of the land comprised therein, every condition or right of re-entry, and every other condition, contained in the lease, shall be apportioned, and shall remain annexed to the severed parts of the reversionary estate as severed, and shall be in force with respect to the term whereon each severed part is reversionary, or the term in any land which has not been surrendered, or as to which

the term has not been avoided or has not otherwise ceased, in like manner as if the land comprised in each severed part, or the land as to which the term remains subsisting, as the case may be, had alone originally been comprised in the lease.

(2.) This section applies only to leases made after the commencement of this Act.

On sub-demise, title to leasehold reversion not to be required.

13.—(1.) On a contract to grant a lease for a term of years to be derived out of a leasehold interest, with a leasehold reversion, the intended lessee shall not have the right to call for the title to that reversion.

(2.) This section applies only if and so far as a contrary intention is not expressed in the contract, and shall have effect subject to the terms of the contract and to the provisions therein contained.

(3.) This section applies only to contracts made after the commencement of this Act.

Forfeiture.

Restrictions on and relief against forfeiture of leases.

14.—(1.) A right of re-entry or forfeiture under any proviso or stipulation in a lease, for a breach of any covenant or condition in the lease, shall not be enforceable, by action or otherwise, unless and until the lessor serves on the lessee a notice specifying the particular breach complained of and, if the breach is capable of remedy, requiring the lessee to remedy the breach, and, in any case, requiring the lessee to make compensation in money for the breach, and the lessee fails, within a reasonable time thereafter, to remedy the breach, if it is capable of remedy, and to make reasonable compensation in money, to the satisfaction of the lessor, for the breach.

(2.) Where a lessor is proceeding, by action or otherwise, to enforce such a right of re-entry or forfeiture, the lessee may, in the lessor's action, if any, or in any action brought by himself, apply to the Court for relief; and the Court may grant or refuse relief, as the Court, having regard to the proceedings and conduct of the parties under the foregoing provisions of this section, and to all the other circumstances, thinks fit; and in case of relief may grant it on such terms, if any, as to costs, expenses, damages, compensation, penalty, or otherwise, including the granting of an injunction to restrain any like breach in the future, as the Court, in the circumstances of each case, thinks fit.

(3.) For the purposes of this section a lease includes an original or derivative under-lease, also a grant at a fee-farm rent, or securing a rent by condition; and a lessee includes an original or derivative under-lessee, and the heirs, executors, administrators, and assigns of a lessee, also a grantee under such a grant as aforesaid, his heirs and assigns; and a lessor includes an original or derivative under-lessor, and the

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heirs, executors, administrators, and assigns of a lessor, also a grantor as aforesaid, and his heirs and assigns.

(4.) This section applies although the proviso or stipulation under which the right of re-entry or forfeiture accrues is inserted in the lease in pursuance of the directions of any Act of Parliament.

(5.) For the purposes of this section a lease limited to continue as long only as the lessee abstains from committing a breach of covenant shall be and take effect as a lease to continue for any longer term for which it could subsist, but determinable by a proviso for re-entry on such a breach.

(6.) This section does not extend—

(i.) To a covenant or condition against the assigning, underletting, parting with the possession, or disposing of the land leased; or to a condition for forfeiture on the bankruptcy of the lessee, or on the taking in execution of the lessee's interest;

(ii.) Or in case of a mining lease, to a covenant or condition for allowing the lessor to have access to or inspect books, accounts, records, weighing-machines or other things, or to enter or inspect the mine or the workings thereof.

(7.) The enactments described in Part I. of the Second Schedule to this Act are hereby repealed.

(8.) This section shall not affect the law relating to re-entry or forfeiture or relief in case of non-payment of rent.

(9.) This section applies to leases made either before or after the commencement of this Act, and shall have effect notwithstanding any stipulation to the contrary.

IV.—Mortgages.

Obligation on mortgagee to transfer instead of re-conveying.

15.—(1.) Where a mortgagor is entitled to redeem, he shall, by virtue of this Act, have power to require the mortgagee, instead of re-conveying, and on the terms on which he would be bound to re-convey, to assign the mortgage debt and convey the mortgaged property to any third person, as the mortgagor directs; and the mortgagee shall, by virtue of this Act, be bound to assign and convey accordingly.

(2.) This section does not apply in the case of a mortgagee being or having been in possession.

(3.) This section applies to mortgages made either before or after the commencement of this Act, and shall have effect notwithstanding any stipulation to the contrary.

Power for mortgagor to inspect title-deeds.

16.—(1.) A mortgagor, as long as his right to redeem subsists, shall, by virtue of this Act, be entitled from time to time, at reasonable times, on his request, and at his own cost, and on payment of the mortgagee's costs and expenses in this behalf, to inspect and make copies or abstracts

of or extracts from the documents of title relating to the mortgaged property in the custody or power of the mortgagee.

(2.) This section applies only to mortgages made after the commencement of this Act, and shall have effect notwithstanding any stipulation to the contrary.

Restriction on consolidation of mortgages.

17.—(1.) A mortgagor seeking to redeem any one mortgage, shall, by virtue of this Act, be entitled to do so, without paying any money due under any separate mortgage made by him, or by any person through whom he claims, on property other than that comprised in the mortgage which he seeks to redeem.

(2.) This section applies only if and as far as a contrary intention is not expressed in the mortgage deeds or one of them.

(3.) This section applies only where the mortgages or one of them are or is made after the commencement of this Act.

Leases.

Leasing power of mortgagor and of mortgagee in possession.

18.—(1.) A mortgagor of land while in possession shall, as against every incumbrancer, have, by virtue of this Act, power to make from time to time any such lease of the mortgaged land, or any part thereof, as is in this section described and authorized.

(2.) A mortgagee of land while in possession shall, as against all prior incumbrancers, if any, and as against the mortgagor, have, by virtue of this Act, power to make from time to time any such lease as aforesaid.

(3.) The leases which this section authorizes are—

(i.) An agricultural or occupation lease for any term not exceeding twenty-one years; and

(ii.) A building lease for any term not exceeding ninety-nine years.

(4.) Every person making a lease under this section may execute and do all assurances and things necessary or proper in that behalf.

(5.) Every such lease shall be made to take effect in possession not later than twelve months after its date.

(6.) Every such lease shall reserve the best rent that can reasonably be obtained, regard being had to the circumstances of the case, but without any fine being taken.

(7.) Every such lease shall contain a covenant by the lessee for payment of the rent, and a condition of re-entry on the rent not being paid within a time therein specified not exceeding thirty days.

(8.) A counterpart of every such lease shall be executed by the lessee and delivered to the lessor, of which execution and delivery the execution of the lease by the lessor shall, in favour of the lessee and all persons deriving title under him, be sufficient evidence.

(9.) Every such building lease shall be made in consideration of the lessee, or some person by whose direction the lease is granted, having

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erected, or agreeing to erect within not more than five years from the date of the lease, buildings, new or additional, or having improved or repaired buildings, or agreeing to improve or repair buildings within that time, or having executed, or agreeing to execute, within that time, on the land leased, an improvement for or in connection with building purposes.

(10.) In any such building lease a peppercorn rent, or a nominal or other rent less than the rent ultimately payable, may be made payable for the first five years, or any less part of the term.

(11.) In case of a lease by the mortgagor, he shall, within one month after making the lease, deliver to the mortgagee, or, where there are more than one, to the mortgagee first in priority, a counterpart of the lease duly executed by the lessee; but the lessee shall not be concerned to see that this provision is complied with.

(12.) A contract to make or accept a lease under this section may be enforced by or against every person on whom the lease if granted would be binding.

(13.) This section applies only if and as far as a contrary intention is not expressed by the mortgagor and mortgagee in the mortgage deed, or otherwise in writing, and shall have effect subject to the terms of the mortgage deed or of any such writing and to the provisions therein contained.

(14.) Nothing in this Act shall prevent the mortgage deed from reserving to or conferring on the mortgagor or the mortgagee, or both, any further or other powers of leasing or having reference to leasing; and any further or other powers so reserved or conferred shall be exercisable, as far as may be, as if they were conferred by this Act, and with all the like incidents, effects, and consequences, unless a contrary intention is expressed in the mortgage deed.

(15.) Nothing in this Act shall be construed to enable a mortgagor or mortgagee to make a lease for any longer term or on any other conditions than such as could have been granted or imposed by the mortgagor, with the concurrence of all the incumbrancers, if this Act had not been passed.

(16.) This section applies only in case of a mortgage made after the commencement of this Act; but the provisions thereof, or any of them, may, by agreement in writing made after the commencement of this Act, between mortgagor and mortgagee, be applied to a mortgage made before the commencement of this Act, so, nevertheless, that any such agreement shall not prejudicially affect any right or interest of any mortgagee not joining in or adopting the agreement.

(17.) The provisions of this section referring to a lease shall be construed to extend and apply, as far as circumstances admit, to any letting, and to an agreement, whether in writing or not, for leasing or letting.

Sale; Insurance; Receiver; Timber.

Powers incident to estate or interest of mortgagee.

19.—(1.) A mortgagee, where the mortgage is made by deed, shall, by virtue of this Act, have the following powers, to the like extent as if they had been in terms conferred by the mortgage deed, but not further (namely):

(i.) A power, when the mortgage money has become due, to sell or to concur with any other person in selling, the mortgaged property, or any part thereof, either subject to prior charges, or not, and either together or in lots, by public auction or by private contract, subject to such conditions respecting title, or evidence of title, or other matter, as he (the mortgagee) thinks fit, with power to vary any contract for sale, and to buy in at an auction, or to rescind any contract for sale, and to re-sell, without being answerable for any loss occasioned thereby; and

(ii.) A power, at any time after the date of the mortgage deed, to insure and keep insured against loss or damage by fire any building, or any effects or property of an insurable nature, whether affixed to the freehold or not, being or forming part of the mortgaged property, and the premiums paid for any such insurance shall be a charge on the mortgaged property, in addition to the mortgage money, and with the same priority, and with interest at the same rate, as the mortgage money; and

(iii.) A power, when the mortgage money has become due, to appoint a receiver of the income of the mortgaged property, or of any part thereof; and

(iv.) A power, while the mortgagee is in possession, to cut and sell timber and other trees ripe for cutting, and not planted or left standing for shelter or ornament, or to contract for any such cutting and sale, to be completed within any time not exceeding twelve months from the making of the contract.

(2.) The provisions of this Act relating to the foregoing powers comprised either in this section, or in any subsequent section regulating the exercise of those powers, may be varied or extended by the mortgage deed, and, as so varied or extended, shall, as far as may be, operate in the like manner and with all the like incidents, effects, and consequences, as if such variations or extensions were contained in this Act.

(3.) This section applies only if and as far as a contrary intention is not expressed in the mortgage deed, and shall have effect subject to the terms of the mortgage deed and to the provisions therein contained.

(4.) This section applies only where the mortgage deed is executed after the commencement of this Act.

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Regulation of exercise of power of sale.

20. A mortgagee shall not exercise the power of sale conferred by this Act unless and until—

(i.) Notice requiring payment of the mortgage money has been served on the mortgagor or one of several mortgagors, and default has been made in payment of the mortgage money, or of part thereof, for three months after such service; or

(ii.) Some interest under the mortgage is in arrear and unpaid for two months after becoming due; or

(iii.) There has been a breach of some provision contained in the mortgage deed or in this Act, and on the part of the mortgagor, or of some person concurring in making the mortgage, to be observed or performed, other than and besides a covenant for payment of the mortgage money or interest thereon.

Conveyance, receipt, &c., on sale.

21.—(1.) A mortgagee exercising the power of sale conferred by this Act shall have power, by deed, to convey the property sold, for such estate and interest therein as is the subject of the mortgage, freed from all estates, interests, and rights to which the mortgage has priority, but subject to all estates, interests, and rights which have priority to the mortgage; except that, in the case of copyhold or customary land, the legal right to admittance shall not pass by a deed under this section, unless the deed is sufficient otherwise by law, or is sufficient by custom, in that behalf.

(2.) Where a conveyance is made in professed exercise of the power of sale conferred by this Act, the title of the purchaser shall not be impeachable on the ground that no case had arisen to authorize the sale, or that due notice was not given, or that the power was otherwise improperly or irregularly exercised; but any person damnified by an unauthorized, or improper, or irregular exercise of the power shall have his remedy in damages against the person exercising the power.

(3.) The money which is received by the mortgagee, arising from the sale, after discharge of prior incumbrances to which the sale is not made subject, if any, or after payment into Court under this Act of a sum to meet any prior incumbrance, shall be held by him in trust to be applied by him, first, in payment of all costs, charges, and expenses, properly incurred by him, as incident to the sale or any attempted sale, or otherwise; and secondly, in discharge of the mortgage money, interest, and costs, and other money, if any, due under the mortgage; and the residue of the money so received shall be paid to the person entitled to the mortgaged property, or authorized to give receipts for the proceeds of the sale thereof.

(4.) The power of sale conferred by this Act may be exercised by any person for the time being entitled to receive and give a discharge for the mortgage money.

(5.) The power of sale conferred by this Act shall not affect the right of foreclosure. 44 & 45 Vict. c. 41.

(6.) The mortgagee, his executors, administrators, or assigns, shall not be answerable for any involuntary loss happening in or about the exercise or execution of the power of sale conferred by this Act or of any trust connected therewith.

(7) At any time after the power of sale conferred by this Act has become exercisable, the person entitled to exercise the same may demand and recover from any person, other than a person having in the mortgaged property an estate, interest, or right in priority to the mortgage, all the deeds and documents relating to the property, or to the title thereto, which a purchaser under the power of sale would be entitled to demand and recover from him.

Mortgagees' receipts, discharges, &c.

22.—(1.) The receipt in writing of a mortgagee shall be a sufficient discharge for any money arising under the power of sale conferred by this Act, or for any money or securities comprised in his mortgage, or arising thereunder; and a person paying or transferring the same to the mortgagee shall not be concerned to inquire whether any money remains due under the mortgage.

(2.) Money received by a mortgagee under his mortgage or from the proceeds of securities comprised in his mortgage shall be applied in like manner as in this Act directed respecting money received by him arising from a sale under the power of sale conferred by this Act; but with this variation, that the costs, charges, and expenses payable shall include the costs, charges, and expenses properly incurred of recovering and receiving the money or securities, and of conversion of securities into money, instead of those incident to sale.

Amount and application of insurance money.

23.—(1.) The amount of an insurance effected by a mortgagee against loss or damage by fire under the power in that behalf conferred by this Act shall not exceed the amount specified in the mortgage deed, or, if no amount is therein specified, then shall not exceed two third parts of the amount that would be required, in case of total destruction, to restore the property insured.

(2.) An insurance shall not, under the power conferred by this Act, be effected by a mortgagee in any of the following cases (namely):

(i.) Where there is a declaration in the mortgage deed that no insurance is required:

(ii.) Where an insurance is kept up by or on behalf of the mortgagor in accordance with the mortgage deed:

(iii.) Where the mortgage deed contains no stipulation respecting insurance, and an insurance is kept up by or on behalf of the mortgagor, to the amount in which the mortgagee is by this Act authorized to insure.

(3.) All money received on an insurance effected under the mortgage deed or under this Act shall, if the mortgagee so requires, be applied by

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the mortgagor in making good the loss or damage in respect of which the money is received.

(4.) Without prejudice to any obligation to the contrary imposed by law, or by special contract, a mortgagee may require that all money received on an insurance be applied in or towards discharge of the money due under his mortgage.

Appointment, powers, remuneration, and duties of receiver.

24.—(1.) A mortgagee entitled to appoint a receiver under the power in that behalf conferred by this Act shall not appoint a receiver until he has become entitled to exercise the power of sale conferred by this Act, but may then, by writing under his hand, appoint such person as he thinks fit to be receiver.

(2.) The receiver shall be deemed to be the agent of the mortgagor; and the mortgagor shall be solely responsible for the receiver's acts or defaults, unless the mortgage deed otherwise provides.

(3.) The receiver shall have power to demand and recover all the income of the property of which he is appointed receiver, by action, distress, or otherwise, in the name either of the mortgagor or of the mortgagee, to the full extent of the estate or interest which the mortgagor could dispose of, and to give effectual receipts, accordingly, for the same.

(4.) A person paying money to the receiver shall not be concerned to inquire whether any case has happened to authorize the receiver to act.

(5.) The receiver may be removed, and a new receiver may be appointed from time to time by the mortgagee by writing under his hand.

(6.) The receiver shall be entitled to retain out of any money received by him, for his remuneration, and in satisfaction of all costs, charges, and expenses incurred by him as receiver, a commission at such rate, not exceeding five per centum on the gross amount of all money received, as is specified in his appointment, and if no rate is so specified, then at the rate of five per centum on that gross amount, or at such higher rate as the Court thinks fit to allow, on application made by him for that purpose.

(7.) The receiver shall, if so directed in writing by the mortgagee, insure and keep insured against loss or damage by fire, out of the money received by him, any building, effects, or property comprised in the mortgage, whether affixed to the freehold or not, being of an insurable nature.

(8.) The receiver shall apply all money received by him as follows (namely):

(i.) In discharge of all rents, taxes, rates, and outgoings whatever affecting the mortgaged property; and

(ii.) In keeping down all annual sums or other payments, and the interest on all principal sums, having priority to the mortgage in right whereof he is receiver; and

(iii.) In payment of his commission, and of the premiums on fire, life, or other insurances, if any, properly payable under the mortgage deed or under this Act, and the cost of executing necessary or proper repairs directed in writing by the mortgagee; and

(iv.) In payment of the interest accruing due in respect of any principal money due under the mortgage:

and shall pay the residue of the money received by him to the person who, but for the possession of the receiver, would have been entitled to receive the income of the mortgaged property, or who is otherwise entitled to that property.

44 & 45 Vict. c. 41.

Action respecting Mortgage.

Sale of mortgaged property in action for foreclosure, &c.

25.—(1.) Any person entitled to redeem mortgaged property may have a judgment or order for sale instead of for redemption in an action brought by him either for redemption alone, or for sale alone, or for sale or redemption, in the alternative.

(2.) In any action, whether for foreclosure, or for redemption, or for sale, or for the raising and payment in any manner of mortgage money, the Court, on the request of the mortgagee, or of any person interested either in the mortgage money or in the right of redemption, and, notwithstanding the dissent of any other person, and notwithstanding that the mortgagee or any person so interested does not appear in the action, and without allowing any time for redemption or for payment of any mortgage money, may, if it thinks fit, direct a sale of the mortgaged property, on such terms as it thinks fit, including, if it thinks fit, the deposit in Court of a reasonable sum fixed by the Court, to meet the expenses of sale and to secure performance of the terms.

(3.) But, in an action brought by a person interested in the right of redemption and seeking a sale, the Court may, on the application of any defendant, direct the plaintiff to give such security for costs as the Court thinks fit, and may give the conduct of the sale to any defendant, and may give such directions as it thinks fit respecting the costs of the defendants or any of them.

(4.) In any case within this section the Court may, if it thinks fit, direct a sale without previously determining the priorities of incumbrancers.

(5.) This section applies to actions brought either before or after the commencement of this Act.

(6.) The enactment described in Part II. of the Second Schedule to this Act is hereby repealed.

15 & 16 Vict. c. 86, s. 48.

(7.) This section does not extend to Ireland.

V.—Statutory Mortgage.

Form of statutory

26.—(1.) A mortgage of freehold or leasehold land may be made by

44 & 45 Vict. c. 41.

mortgage in schedule.

a deed expressed to be made by way of statutory mortgage, being in the form given in Part I. of the Third Schedule to this Act, with such variations and additions, if any, as circumstances may require, and the provisions of this section shall apply thereto.

(2.) There shall be deemed to be included, and there shall by virtue of this Act be implied, in the mortgage deed—

First, a covenant with the mortgagee by the person expressed therein to convey as mortgagor to the effect following (namely):

That the mortgagor will, on the stated day, pay to the mortgagee the stated mortgage money, with interest thereon in the meantime, at the stated rate, and will thereafter, if and as long as the mortgage money or any part thereof remains unpaid, pay to the mortgagee interest thereon, or on the unpaid part thereof, at the stated rate, by equal half-yearly payments, the first thereof to be made at the end of six calendar months from the day stated for payment of the mortgage money:

Secondly, a proviso to the effect following (namely):

That if the mortgagor, on the stated day, pays to the mortgagee the stated mortgage money, with interest thereon in the meantime, at the stated rate, the mortgagee at any time thereafter, at the request and cost of the mortgagor, shall reconvey the mortgaged property to the mortgagor, or as he shall direct.

Forms of statutory transfer of mortgage in schedule.

27.—(1.) A transfer of a statutory mortgage may be made by a deed expressed to be made by way of statutory transfer of mortgage, being in such one of the three forms (A.) and (B.) and (C.) given in Part II. of the Third Schedule to this Act as may be appropriate to the case, with such variations and additions, if any, as circumstances may require, and the provisions of this section shall apply thereto.

(2.) In whichever of those three forms the deed of transfer is made, it shall have effect as follows (namely):

(i.) There shall become vested in the person to whom the benefit of the mortgage is expressed to be transferred, who, with his executors, administrators, and assigns, is hereafter in this section designated the transferee, the right to demand, sue for, recover, and give receipts for the mortgage money, or the unpaid part thereof, and the interest then due, if any, and thenceforth to become due thereon, and the benefit of all securities for the same, and the benefit of and the right to sue on all covenants with the mortgagee, and the right to exercise all powers of the mortgagee:

(ii.) All the estate and interest, subject to redemption, of the mortgagee in the mortgaged land shall vest in the transferee, subject to redemption.

(3.) If the deed of transfer is made in the form (B.), there shall also be deemed to be included, and there shall by virtue of this Act be implied therein, a covenant with the transferee by the person expressed to join therein as covenantor to the effect following (namely):

That the covenantor will, on the next of the days by the mortgage deed fixed for payment of interest, pay to the transferee the stated mortgage money, or so much thereof as then remains unpaid, with interest thereon, or on the unpaid part thereof, in the meantime, at the rate stated in the mortgage deed; and will thereafter, as long as the mortgage money, or any part thereof, remains unpaid, pay to the transferee interest on that sum, or the unpaid part thereof, at the same rate, on the successive days by the mortgage deed fixed for payment of interest.

(4.) If the deed of transfer is made in the form (C.), it shall, by virtue of this Act, operate not only as a statutory transfer of mortgage, but also as a statutory mortgage, and the provisions of this section shall have effect in relation thereto, accordingly; but it shall not be liable to any increased stamp duty by reason only of its being designated a mortgage.

Implied covenants, joint and several.

28. In a deed of statutory mortgage, or of statutory transfer of mortgage, where more persons than one are expressed to convey as mortgagors, or to join as covenantors, the implied covenant on their part shall be deemed to be a joint and several covenant by them; and where there are more mortgagees or more transferees than one, the implied covenant with them shall be deemed to be a covenant with them jointly, unless the amount secured is expressed to be secured to them in shares or distinct sums, in which latter case the implied covenant with them shall be deemed to be a covenant with each severally in respect of the share or distinct sum secured to him.

Form of reconveyance of statutory mortgage in schedule.

29. A reconveyance of a statutory mortgage may be made by a deed expressed to be made by way of statutory reconveyance of mortgage, being in the form given in Part III. of the Third Schedule to this Act, with such variations and additions, if any, as circumstances may require.

VI.—Trust and Mortgage Estates on Death.

Devolution of trust and mortgage estates on death.

30.—(1.) (*a*) Where an estate or interest of inheritance, or limited to the heir as special occupant, in any tenements or hereditaments, corporeal or incorporeal, is vested on any trust, or by way of mortgage, in any person solely, the same shall, on his death, notwithstanding any testamentary disposition, devolve to and become vested in his personal representatives or representative from time to time, in like manner as if the same were a chattel real vesting in them or him; and accordingly all the like powers, for one only of several joint personal representatives, as well as for a single personal representative, and for all the personal representatives together, to dispose of and otherwise deal with the same, shall

(*a*) Repealed as to copyholds by the Copyhold Act, 1887 (50 & 51 Vict. c. 73' s. 45).

44 & 45 Vict. c. 41.

belong to the deceased's personal representatives or representative from time to time, with all the like incidents, but subject to all the like rights, equities, and obligations, as if the same were a chattel real vesting in them or him; and, for the purposes of this section, the personal representatives, for the time being, of the deceased, shall be deemed in law his heirs and assigns, within the meaning of all trusts and powers.

37 & 38 Vict. c. 78. 38 & 39 Vict. c. 87.

(2.) Section four of the Vendor and Purchaser Act, 1874, and section forty-eight of the Land Transfer Act, 1875, are hereby repealed.

(3.) This section, including the repeals therein, applies only in cases of death after the commencement of this Act.

VII.—Trustees and Executors.

Appointment of new trustees, vesting of trust property, &c.

31.—(1.) Where a trustee, either original or substituted, and whether appointed by a Court or otherwise, is dead, or remains out of the United Kingdom for more than twelve months, or desires to be discharged from the trusts or powers reposed in or conferred on him, or refuses or is unfit to act therein, or is incapable of acting therein, then the person or persons nominated for this purpose by the instrument, if any, creating the trust, or if there is no such person, or no such person able and willing to act, then the surviving or continuing trustees or trustee for the time being, or the personal representatives of the last surviving or continuing trustee, may, by writing, appoint another person or other persons to be a trustee or trustees in the place of the trustee dead, remaining out of the United Kingdom, desiring to be discharged, refusing or being unfit, or being incapable, as aforesaid.

(2.) On an appointment of a new trustee, the number of trustees may be increased.

(3.) On an appointment of a new trustee, it shall not be obligatory to appoint more than one new trustee, where only one trustee was originally appointed, or to fill up the original number of trustees, where more than two trustees were originally appointed; but, except where only one trustee was originally appointed, a trustee shall not be discharged under this section from his trust unless there will be at least two trustees to perform the trust.

(4.) On an appointment of a new trustee any assurance or thing requisite for vesting the trust property, or any part thereof, jointly in the persons who are the trustees, shall be executed or done.

(5.) Every new trustee so appointed, as well before as after all the trust property becomes by law, or by assurance, or otherwise, vested in him, shall have the same powers, authorities, and discretions, and may in all respects act, as if he had been originally appointed a trustee by the instrument, if any, creating the trust.

(6.) The provisions of this section relative to a trustee who is dead include the case of a person nominated trustee in a will but dying

before the testator; and those relative to a continuing trustee include a refusing or retiring trustee, if willing to act in the execution of the provisions of this section.

44 & 45 Vict. c. 41.

(7.) This section applies only if and as far as a contrary intention is not expressed in the instrument, if any, creating the trust, and shall have effect subject to the terms of that instrument and to any provisions therein contained.

(8.) This section applies to trusts created either before or after the commencement of this Act.

Retirement of trustee.

32.—(1.) Where there are more than two trustees, if one of them by deed declares that he is desirous of being discharged from the trust, and if his co-trustees and such other person, if any, as is empowered to appoint trustees, by deed consent to the discharge of the trustee, and to the vesting in the co-trustees alone of the trust property, then the trustee desirous of being discharged shall be deemed to have retired from the trust, and shall, by the deed, be discharged therefrom under this Act, without any new trustee being appointed in his place.

(2.) Any assurance or thing requisite for vesting the trust property in the continuing trustees alone shall be executed or done.

(3.) This section applies only if and as far as a contrary intention is not expressed in the instrument, if any, creating the trust, and shall have effect subject to the terms of that instrument and to any provisions therein contained.

(4.) This section applies to trusts created either before or after the commencement of this Act.

Powers of new trustee appointed by Court.

33.—(1.) Every trustee appointed by the Court of Chancery, or by the Chancery Division of the Court, or by any other Court of competent jurisdiction, shall, as well before as after the trust property becomes by law, or by assurance, or otherwise, vested in him, have the same powers, authorities, and discretions, and may in all respects act, as if he had been originally appointed a trustee by the instrument, if any, creating the trust.

(2.) This section applies to appointments made either before or after the commencement of this Act.

Vesting of trust property in new or continuing trustees.

34.—(1.) Where a deed by which a new trustee is appointed to perform any trust contains a declaration by the appointor to the effect that any estate or interest in any land subject to the trust, or in any chattel so subject, or the right to recover and receive any debt or other thing in action so subject, shall vest in the persons who by virtue of the deed become and are the trustees for performing the trust, that declaration shall, without any conveyance or assignment, operate to vest in those persons as joint tenants, and for the purposes of the trust, that estate, interest, or right.

(2.) Where a deed by which a retiring trustee is discharged under this Act contains such a declaration as is in this section mentioned by

44 & 45 Vict. c. 41.

the retiring and continuing trustees, and by the other person, if any, empowered to appoint trustees, that declaration shall, without any conveyance or assignment, operate to vest in the continuing trustees alone, as joint tenants, and for the purposes of the trust, the estate, interest, or right to which the declaration relates.

(3.) This section does not extend to any legal estate or interest in copyhold or customary land, or to land conveyed by way of mortgage for securing money subject to the trust, or to any such share, stock, annuity, or property as is only transferable in books kept by a company or other body, or in manner prescribed by or under Act of Parliament.

(4.) For purposes of registration of the deed in any registry, the person or persons making the declaration shall be deemed the conveying party or parties, and the conveyance shall be deemed to be made by him or them under a power conferred by this Act.

(5.) This section applies only to deeds executed after the commencement of this Act.

Power for trustees for sale to sell by auction, &c.

35.—(1.) Where a trust for sale or a power of sale of property is vested in trustees, they may sell or concur with any other person in selling all or any part of the property, either subject to prior charges or not, and either together or in lots, by public auction or by private contract, subject to any such conditions respecting title or evidence of title, or other matter, as the trustees think fit, with power to vary any contract for sale, and to buy in at any auction, or to rescind any contract for sale, and to resell, without being answerable for any loss.

(2.) This section applies only if and as far as a contrary intention is not expressed in the instrument creating the trust or power, and shall have effect subject to the terms of that instrument and to the provisions therein contained.

(3.) This section applies only to a trust or power created by an instrument coming into operation after the commencement of this Act.

Trustees' receipts.

36.—(1.) The receipt in writing of any trustees or trustee for any money, securities, or other personal property or effects payable, transferable, or deliverable to them or him under any trust or power shall be a sufficient discharge for the same, and shall effectually exonerate the person paying, transferring, or delivering the same from seeing to the application or being answerable for any loss or misapplication thereof.

(2.) This section applies to trusts created either before or after the commencement of this Act.

Power for executors and trustees to compound, &c.

37.—(1.) An executor may pay or allow any debt or claim on any evidence that he thinks sufficient.

(2.) An executor, or two or more trustees acting together, or a sole acting trustee where, by the instrument, if any, creating the trust, a sole trustee is authorized to execute the trusts and powers thereof, may, if and as he or they think fit, accept any composition, or any security, real or personal, for any debt, or for any property, real or personal,

claimed, and may allow any time for payment of any debt, and may compromise, compound, abandon, submit to arbitration, or otherwise settle any debt, account, claim, or thing whatever relating to the testator's estate or to the trust, and for any of those purposes may enter into, give, execute, and do such agreements, instruments of composition or arrangement, releases and other things as to him or them seem expedient, without being responsible for any loss occasioned by any act or thing so done by him or them in good faith.

(3.) As regards trustees, this section applies only if and as far as a contrary intention is not expressed in the instrument, if any, creating the trust, and shall have effect subject to the terms of that instrument and to the provisions therein contained.

(4.) This section applies to executorships and trusts constituted or created either before or after the commencement of this Act.

Powers to two or more executors or trustees.

38.—(1.) Where a power or trust is given to or vested in two or more executors or trustees jointly, then, unless the contrary is expressed in the instrument, if any, creating the power or trust, the same may be exercised or performed by the survivor or survivors of them for the time being.

(2.) This section applies only to executorships and trusts constituted after or created by instruments coming into operation after the commencement of this Act.

VIII.—Married Women.

Power for Court to bind interest of married woman.

39.—(1.) Notwithstanding that a married woman is restrained from anticipation, the Court may, if it thinks fit, where it appears to the Court to be for her benefit, by judgment or order, with her consent, bind her interest in any property.

(2.) This section applies only to judgments or orders made after the commencement of this Act.

Power of attorney of married woman.

40.—(1.) A married woman, whether an infant or not, shall by virtue of this Act have power, as if she were unmarried and of full age, by deed to appoint an attorney on her behalf for the purpose of executing any deed or doing any other act which she might herself execute or do; and the provisions of this Act relating to instruments creating powers of attorney shall apply thereto.

(2.) This section applies only to deeds executed after the commencement of this Act.

IX.—Infants.

Sales and leases on behalf of infant owner. 40 & 41 Vict. c. 18.

41. Where a person in his own right seised of or entitled to land for an estate in fee simple, or for any leasehold interest at a rent, is an infant, the land shall be deemed to be a settled estate within the Settled Estates Act, 1877.

44 & 45 Vict. c. 41.

Management of land and receipt and application of income during minority.

42.—(1.) If and as long as any person who would but for this section be beneficially entitled to the possession of any land is an infant, and being a woman is also unmarried, the trustees appointed for this purpose by the settlement, if any, or if there are none so appointed, then the persons, if any, who are for the time being under the settlement trustees with power of sale of the settled land, or of part thereof, or with power of consent to or approval of the exercise of such a power of sale, or if there are none, then any persons appointed as trustees for this purpose by the Court, on the application of a guardian or next friend of the infant, may enter into and continue in possession of the land; and in every such case the subsequent provisions of this section shall apply.

(2.) The trustees shall manage or superintend the management of the land, with full power to fell timber or cut underwood from time to time in the usual course for sale, or for repairs or otherwise, and to erect, pull down, rebuild, and repair houses, and other buildings and erections, and to continue the working of mines, minerals, and quarries which have usually been worked, and to drain or otherwise improve the land or any part thereof, and to insure against loss by fire, and to make allowances to and arrangements with tenants and others, and to determine tenancies, and to accept surrenders of leases and tenancies, and generally to deal with the land in a proper and due course of management; but so that, where the infant is impeachable for waste, the trustees shall not commit waste, and shall cut timber on the same terms only, and subject to the same restrictions, on and subject to which the infant could, if of full age, cut the same.

(3.) The trustees may from time to time, out of the income of the land, including the produce of the sale of timber and underwood, pay the expenses incurred in the management, or in the exercise of any power conferred by this section, or otherwise in relation to the land, and all outgoings not payable by any tenant or other person, and shall keep down any annual sum, and the interest of any principal sum, charged on the land.

(4.) The trustees may apply at discretion any income which, in the exercise of such discretion, they deem proper, according to the infant's age, for his or her maintenance, education, or benefit, or pay thereout any money to the infant's parent or guardian, to be applied for the same purposes.

(5.) The trustees shall lay out the residue of the income of the land in investment on securities on which they are by the settlement, if any, or by law, authorized to invest trust money, with power to vary investments; and shall accumulate the income of the investments so made in the way of compound interest, by from time to time similarly investing such income and the resulting income of investments; and shall stand possessed of the accumulated fund arising from income of the land and from investments of income on the trusts following (namely):

(i.) If the infant attains the age of twenty-one years, then in trust for the infant;

(ii.) If the infant is a woman and marries while an infant, then in trust for her separate use, independently of her husband, and so that her receipt after she marries, and though still an infant, shall be a good discharge; but

(iii.) If the infant dies while an infant, and being a woman without having been married, then, where the infant was, under a settlement, tenant for life, or by purchase tenant in tail or tail male or tail female, on the trusts, if any, declared of the accumulated fund by that settlement; but where no such trusts are declared, or the infant has taken the land from which the accumulated fund is derived by descent, and not by purchase, or the infant is tenant for an estate in fee simple, absolute or determinable, then in trust for the infant's personal representatives, as part of the infant's personal estate;

but the accumulations, or any part thereof, may at any time be applied as if the same were income arising in the then current year.

(6.) Where the infant's estate or interest is in an undivided share of land, the powers of this section relative to the land may be exercised jointly with persons entitled to possession of, or having power to act in relation to, the other undivided share or shares.

(7.) This section applies only if and as far as a contrary intention is not expressed in the instrument under which the interest of the infant arises, and shall have effect subject to the terms of that instrument and to the provisions therein contained.

(8.) This section applies only where that instrument comes into operation after the commencement of this Act.

Application by trustees of income of property of infant for maintenance, &c.

43.—(1.) Where any property is held by trustees in trust for an infant, either for life, or for any greater interest, and whether absolutely, or contingently on his attaining the age of twenty-one years, or on the occurrence of any event before his attaining that age, the trustees may, at their sole discretion, pay to the infant's parent or guardian, if any, or otherwise apply for or towards the infant's maintenance, education, or benefit, the income of that property, or any part thereof, whether there is any other fund applicable to the same purpose, or any person bound by law to provide for the infant's maintenance or education or not.

(2.) The trustees shall accumulate all the residue of that income in the way of compound interest, by investing the same and the resulting income thereof from time to time on securities on which they are by the settlement, if any, or by law, authorized to invest trust money, and shall hold those accumulations for the benefit of the person who ultimately becomes entitled to the property from which the same arise; but so that the trustees may at any time, if they think fit, apply those accu-

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mulations, or any part thereof, as if the same were income arising in the then current year.

(3.) This section applies only if and as far as a contrary intention is not expressed in the instrument under which the interest of the infant arises, and shall have effect subject to the terms of that instrument and to the provisions therein contained.

(4.) This section applies whether that instrument comes into operation before or after the commencement of this Act.

X.—Rentcharges and other Annual Sums.

Remedies for recovery of annual sums charged on land.

44.—(1.) Where a person is entitled to receive out of any land, or out of the income of any land, any annual sum, payable half-yearly or otherwise, whether charged on the land or on the income of the land, and whether by way of rentcharge or otherwise, not being rent incident to a reversion, then, subject and without prejudice to all estates, interests, and rights having priority to the annual sum, the person entitled to receive the same shall have such remedies for recovering and compelling payment of the same as are described in this section, as far as those remedies might have been conferred by the instrument under which the annual sum arises, but not further.

(2.) If at any time the annual sum or any part thereof is unpaid for twenty-one days next after the time appointed for any payment in respect thereof, the person entitled to receive the annual sum may enter into and distrain on the land charged or any part thereof, and dispose according to law of any distress found, to the intent that thereby or otherwise the annual sum and all arrears thereof, and all costs and expenses occasioned by non-payment thereof, may be fully paid.

(3.) If at any time the annual sum or any part thereof is unpaid for forty days next after the time appointed for any payment in respect thereof, then, although no legal demand has been made for payment thereof, the person entitled to receive the annual sum may enter into possession of and hold the land charged or any part thereof, and take the income thereof, until thereby or otherwise the annual sum and all arrears thereof due at the time of his entry, or afterwards becoming due during his continuance in possession, and all costs and expenses occasioned by non-payment of the annual sum, are fully paid; and such possession when taken shall be without impeachment of waste.

(4.) In the like case the person entitled to the annual charge, whether taking possession or not, may also by deed demise the land charged, or any part thereof, to a trustee for a term of years, with or without impeachment of waste, on trust, by mortgage, or sale, or demise, for all or any part of the term, of the land charged, or of any part thereof, or by receipt of the income thereof, or by all or any of those means, or by any other reasonable means, to raise and pay the annual sum and all

arrears thereof due or to become due, and all costs and expenses occasioned by non-payment of the annual sum, or incurred in compelling or obtaining payment thereof, or otherwise relating thereto, including the costs of the preparation and execution of the deed of demise, and the costs of the execution of the trusts of that deed; and the surplus, if any, of the money raised, or of the income received, under the trusts of that deed shall be paid to the person for the time being entitled to the land therein comprised in reversion immediately expectant on the term thereby created.

44 & 45 Vict. c. 41.

(5.) This section applies only if and as far as a contrary intention is not expressed in the instrument under which the annual sum arises, and shall have effect subject to the terms of that instrument and to the provisions therein contained.

(6.) This section applies only where that instrument comes into operation after the commencement of this Act.

Redemption of quit rents and other perpetual charges.

45.—(1.) Where there is a quit rent, chief rent, rentcharge, or other annual sum issuing out of land (in this section referred to as the rent), the Copyhold Commissioners shall at any time, on the requisition of the owner of the land, or of any person interested therein, certify the amount of money in consideration whereof the rent may be redeemed.

(2.) Where the person entitled to the rent is absolutely entitled thereto in fee simple in possession, or is empowered to dispose thereof absolutely, or to give an absolute discharge for the capital value thereof, the owner of the land, or any person interested therein, may, after serving one month's notice on the person entitled to the rent, pay or tender to that person the amount certified by the Commissioners.

(3.) On proof to the Commissioners that payment or tender has been so made, they shall certify that the rent is redeemed under this Act; and that certificate shall be final and conclusive, and the land shall be thereby absolutely freed and discharged from the rent.

(4.) Every requisition under this section shall be in writing; and every certificate under this section shall be in writing, sealed with the seal of the Commissioners.

(5.) This section does not apply to tithe rentcharge, or to a rent reserved on a sale or lease, or to a rent made payable under a grant or licence for building purposes, or to any sum or payment issuing out of land not being perpetual.

(6.) This section applies to rents payable at, or created after, the commencement of this Act.

(7.) This section does not extend to Ireland.

XI.—Powers of Attorney.

Execution under power of attorney.

46.—(1.) The donee of a power of attorney may, if he thinks fit, execute, or do any assurance, instrument, or thing in and with his

44 & 45 Vict. c. 41.

own name and signature and his own seal, where sealing is required, by the authority of the donor of the power; and every assurance, instrument, and thing so executed and done shall be as effectual in law, to all intents, as if it had been executed or done by the donee of the power in the name and with the signature and seal of the donor thereof.

(2.) This section applies to powers of attorney created by instruments executed either before or after the commencement of this Act.

Payment by attorney under power without notice of death, &c., good.

47.—(1.) Any person making or doing any payment or act, in good faith, in pursuance of a power of attorney, shall not be liable in respect of the payment or act by reason that before the payment or act the donor of the power had died or become lunatic, of unsound mind, or bankrupt, or had revoked the power, if the fact of death, lunacy, unsoundness of mind, bankruptcy, or revocation was not at the time of the payment or act known to the person making or doing the same.

(2.) But this section shall not affect any right against the payee of any person interested in any money so paid; and that person shall have the like remedy against the payee as he would have had against the payer if the payment had not been made by him.

(3.) This section applies only to payments and acts made and done after the commencement of this Act.

Deposit of original instruments creating powers of attorney.

48.—(1.) An instrument creating a power of attorney, its execution being verified by affidavit, statutory declaration, or other sufficient evidence, may, with the affidavit or declaration, if any, be deposited in the Central Office of the Supreme Court of Judicature.

(2.) A separate file of instruments so deposited shall be kept, and any person may search that file, and inspect every instrument so deposited, and an office copy thereof shall be delivered out to him on request.

(3.) A copy of an instrument so deposited may be presented at the office, and may be stamped or marked as an office copy, and when so stamped or marked shall become and be an office copy.

(4.) An office copy of an instrument so deposited shall without further proof be sufficient evidence of the contents of the instrument and of the deposit thereof in the Central Office.

(5.) General Rules may be made for purposes of this section, regulating the practice of the Central Office, and prescribing, with the concurrence of the Commissioners of Her Majesty's Treasury, the fees to be taken therein.

(6.) This section applies to instruments creating powers of attorney executed either before or after the commencement of this Act.

XII.—Construction and Effect of Deeds and other Instruments.

Use of word grant unnecessary.

49.—(1.) It is hereby declared that the use of the word grant is not necessary in order to convey tenements or hereditaments, corporeal or incorporeal.

(2.) This section applies to conveyances made before or after the commencement of this Act.

Conveyance by a person to himself, &c.

50.—(1.) Freehold land, or a thing in action, may be conveyed by a person to himself jointly with another person, by the like means by which it might be conveyed by him to another person; and may, in like manner, be conveyed by a husband to his wife, and by a wife to her husband, alone or jointly with another person.

(2.) This section applies only to conveyances made after the commencement of this Act.

Words of limitation in fee or in tail.

51.—(1.) In a deed it shall be sufficient, in the limitation of an estate in fee simple, to use the words in fee simple, without the word heirs; and in the limitation of an estate in tail, to use the words in tail without the words heirs of the body; and in the limitation of an estate in tail mail or in tail female, to use the words in tail male, or in tail female, as the case requires, without the words heirs male of the body, or heirs female of the body.

(2.) This section applies only to deeds executed after the commencement of this Act.

Powers simply collateral.

52.—(1.) A person to whom any power, whether coupled with an interest or not, is given, may by deed release, or contract not to exercise, the power.

(2.) This section applies to powers created by instruments coming into operation either before or after the commencement of this Act.

Construction of supplemental or annexed deed.

53.—(1.) A deed expressed to be supplemental to a previous deed, or directed to be read as an annex thereto, shall, as far as may be, be read and have effect as if the deed so expressed or directed were made by way of indorsement on the previous deed, or contained a full recital thereof.

(2.) This section applies to deeds executed either before or after the commencement of this Act.

Receipt in deed sufficient.

54.—(1.) A receipt for consideration money or securities in the body of a deed shall be a sufficient discharge for the same to the person paying or delivering the same, without any further receipt for the same being indorsed on the deed.

(2.) This section applies only to deeds executed after the commencement of this Act.

Receipt in deed or indorsed, evidence for subsequent purchaser.

55—(1.) A receipt for consideration money or other consideration in the body of a deed or indorsed thereon shall, in favour of a subsequent purchaser, not having notice that the money or other consideration thereby acknowledged to be received was not in fact paid or given, wholly or in part, be sufficient evidence of the payment or giving of the whole amount thereof.

(2.) This section applies only to deeds executed after the commencement of this Act.

Receipt in

56.—(1.) Where a solicitor produces a deed, having in the body

44 & 45 Vict. c. 41.

deed or indorsed, authority for payment to solicitor.

thereof or indorsed thereon a receipt for consideration money or other consideration, the deed being executed, or the indorsed receipt being signed, by the person entitled to give a receipt for that consideration, the deed shall be sufficient authority to the person liable to pay or give the same for his paying or giving the same to the solicitor, without the solicitor producing any separate or other direction or authority in that behalf from the person who executed or signed the deed or receipt.

(2.) This section applies only in cases where consideration is to be paid or given after the commencement of this Act.

Sufficiency of forms in Fourth Schedule.

57. Deeds in the form of and using the expressions in the Forms given in the Fourth Schedule to this Act, or in the like form or using expressions to the like effect, shall as regards form and expression in relation to the provisions of this Act, be sufficient.

Covenants to bind heirs, &c.

58.—(1.) A covenant relating to land of inheritance, or devolving on the heir as special occupant, shall be deemed to be made with the covenantee, his heirs and assigns, and shall have effect as if heirs and assigns were expressed.

(2.) A covenant relating to land not of inheritance, or not devolving on the heir as special occupant, shall be deemed to be made with the covenantee, his executors, administrators, and assigns, and shall have effect as if executors, administrators, and assigns, were expressed.

(3.) This section applies only to covenants made after the commencement of this Act.

Covenants to extend to heirs, &c.

59.—(1.) A covenant, and a contract under seal, and a bond or obligation under seal, though not expressed to bind the heirs, shall operate in law to bind the heirs and real estate, as well as the executors and administrators and personal estate, of the person making the same, as if heirs were expressed.

(2.) This section extends to a covenant implied by virtue of this Act.

(3.) This section applies only if and as far as a contrary intention is not expressed in the covenant, contract, bond, or obligation, and shall have effect subject to the terms of the covenant, contract, bond, or obligation, and to the provisions therein contained.

(4.) This section applies only to a covenant, contract, bond, or obligation made or implied after the commencement of this Act.

Effect of covenant with two or more jointly.

60.—(1.) A covenant, and a contract under seal, and a bond or obligation under seal, made with two or more jointly, to pay money or to make a conveyance, or to do any other act, to them or for their benefit, shall be deemed to include, and shall, by virtue of this Act, imply, an obligation to do the act to, or for the benefit of, the survivor or survivors of them, and to, or for the benefit of, any other person to whom the right to sue on the covenant, contract, bond, or obligation devolves.

(2.) This section extends to a covenant implied by virtue of this Act. 44 & 45 Vict. c. 41.

(3.) This section applies only if and as far as a contrary intention is not expressed in the covenant, contract, bond, or obligation, and shall have effect subject to the covenant, contract, bond, or obligation, and to the provisions therein contained.

(4.) This section applies only to a covenant, contract, bond, or obligation made or implied after the commencement of this Act.

Effect of advance on joint account, &c.

61.—(1.) Where in a mortgage, or an obligation for payment of money, or a transfer of a mortgage or of such an obligation, the sum, or any part of the sum, advanced or owing is expressed to be advanced by or owing to more persons than one out of money, or as money, belonging to them on a joint account, or a mortgage, or such an obligation, or such a transfer is made to more persons than one, jointly, and not in shares, the mortgage money, or other money, or money's worth for the time being due to those persons on the mortgage or obligation, shall be deemed to be and remain money or money's worth belonging to those persons on a joint account, as between them and the mortgagor or obligor; and the receipt in writing of the survivors or last survivor of them, or of the personal representatives of the last survivor, shall be a complete discharge for all money or money's worth for the time being due, notwithstanding any notice to the payer of a severance of the joint account.

(2.) This section applies only if and as far as a contrary intention is not expressed in the mortgage, or obligation, or transfer, and shall have effect subject to the terms of the mortgage, or obligation, or transfer, and to the provisions therein contained.

(3.) This section applies only to a mortgage, or obligation, or transfer made after the commencement of this Act.

Grants of easements, &c., by way of use.

62.—(1.) A conveyance of freehold land to the use that any person may have, for an estate or interest not exceeding in duration the estate conveyed in the land, any easement, right, liberty, or privilege in, or over, or with respect to that land, or any part thereof, shall operate to vest in possession in that person that easement, right, liberty, or privilege, for the estate or interest expressed to be limited to him; and he, and the persons deriving title under him, shall have, use, and enjoy the same accordingly.

(2.) This section applies only to conveyances made after the commencement of this Act.

Provision for all the estate, &c.

63.—(1.) Every conveyance shall, by virtue of this Act, be effectual to pass all the estate, right, title, interest, claim, and demand which the conveying parties respectively have, in, to, or on the property conveyed, or expressed or intended so to be, or which they respectively have power to convey in, to, or on the same.

(2.) This section applies only if and as far as a contrary intention is

44 & 45 Vict. c. 41.

not expressed in the conveyance, and shall have effect subject to the terms of the conveyance and to the provisions therein contained.

(3.) This section applies only to conveyances made after the commencement of this Act.

Construction of implied covenants.

64. In the construction of a covenant or proviso, or other provision, implied in a deed by virtue of this Act, words importing the singular or plural number, or the masculine gender, shall be read as also importing the plural or singular number, or as extending to females, as the case may require.

XIII.—Long Terms.

Enlargement of residue of long term into fee simple.

65.—(1.) Where a residue unexpired of not less than two hundred years of a term, which, as originally created, was for not less than three hundred years, is subsisting in land, whether being the whole land originally comprised in the term, or part only thereof, without any trust or right of redemption affecting the term in favour of the freeholder, or other person entitled in reversion expectant on the term, and without any rent, or with merely a peppercorn rent or other rent having no money value, incident to the reversion, or having had a rent, not being merely a peppercorn rent or other rent having no money value, originally so incident, which subsequently has been released, or has become barred by lapse of time, or has in any other way ceased to be payable, then the term may be enlarged into a fee simple in the manner, and subject to the restrictions, in this section provided.

(2.) Each of the following persons (namely):

(i.) Any person beneficially entitled in right of the term, whether subject to any incumbrance or not, to possession of any land comprised in the term; but, in case of a married woman, with the concurrence of her husband, unless she is entitled for her separate use, whether with restraint on anticipation or not, and then without his concurrence;

(ii.) Any person being in receipt of income as trustee, in right of the term, or having the term vested in him in trust, for sale, whether subject to any incumbrance or not;

(iii.) Any person in whom, as personal representative of any deceased person, the term is vested, whether subject to any incumbrance or not;

shall, as far as regards the land to which he is entitled, or in which he is interested, in right of the term, in any such character as aforesaid, have power by deed to declare to the effect that, from and after the execution of the deed, the term shall be enlarged into a fee simple.

(3.) Thereupon, by virtue of the deed and of this Act, the term shall become and be enlarged accordingly, and the person in whom the term was previously vested shall acquire and have in the land a fee simple instead of the term.

(4.) The estate in fee simple so acquired by enlargement shall be subject to all the same trusts, powers, executory limitations over, rights, and equities, and to all the same covenants, and provisions relating to user and enjoyment, and to all the same obligations of every kind, as the term would have been subject to if it had not been so enlarged.

(5.) But where any land so held for the residue of a term has been settled in trust by reference to other land, being freehold land, so as to go along with that other land as far as the law permits, and, at the time of enlargement, the ultimate beneficial interest in the term, whether subject to any subsisting particular estate or not, has not become absolutely and indefeasibly vested in any person, then the estate in fee simple acquired as aforesaid shall, without prejudice to any conveyance for value previously made by a person having a contingent or defeasible interest in the term, be liable to be, and shall be, conveyed and settled in like manner as the other land, being freehold land, aforesaid, and until so conveyed and settled shall devolve beneficially as if it had been so conveyed and settled.

(6.) The estate in fee simple so acquired shall, whether the term was originally created without impeachment of waste or not, include the fee simple in all mines and minerals which at the time of enlargement have not been severed in right, or in fact, or have not been severed or reserved by an inclosure Act or award.

(7.) This section applies to every such term as aforesaid subsisting at or after the commencement of this Act.

XIV.—Adoption of Act.

Protection of solicitor and trustees adopting Act.

66.—(1.) It is hereby declared that the powers given by this Act to any person, and the covenants, provisions, stipulations, and words which under this Act are to be deemed included or implied in any instrument, or are by this Act made applicable to any contract for sale or other transaction, are and shall be deemed in law proper powers, covenants, provisions, stipulations, and words, to be given by or to be contained in any such instrument, or to be adopted in connexion with, or applied to, any such contract or transaction ; and a solicitor shall not be deemed guilty of neglect or breach of duty, or become in any way liable, by reason of his omitting, in good faith, in any such instrument, or in connexion with any such contract or transaction, to negative the giving, inclusion, implication, or application of any of those powers, covenants, provisions, stipulations, or words, or to insert or apply any others in place thereof, in any case where the provisions of this Act would allow of his doing so.

(2.) But nothing in this Act shall be taken to imply that the insertion in any such instrument, or the adoption in connexion with, or the appli-

44 & 45 Vict. c. 41.

cation to, any contract or transaction, of any further or other powers, covenants, provisions, stipulations, or words is improper.

(3.) Where the solicitor is acting for trustees, executors, or other persons in a fiduciary position, those persons shall also be protected in like manner.

(4.) Where such persons are acting without a solicitor, they shall also be protected in like manner.

XV.—Miscellaneous.

Regulations respecting notice.

67.—(1.) Any notice required or authorized by this Act to be served shall be in writing.

(2.) Any notice required or authorized by this Act to be served on a lessee or mortgagor shall be sufficient, although only addressed to the lessee or mortgagor by that designation, without his name, or generally to the persons interested, without any name, and notwithstanding that any person to be affected by the notice is absent, under disability, unborn, or unascertained.

(3.) Any notice required or authorized by this Act to be served shall be sufficiently served if it is left at the last-known place of abode or business in the United Kingdom of the lessee, lessor, mortgagee, mortgagor, or other person to be served, or, in case of a notice required or authorized to be served on a lessee or mortgagor, is affixed or left for him on the land or any house or building comprised in the lease or mortgage, or, in case of a mining lease, is left for the lessee at the office or counting-house of the mine.

(4.) Any notice required or authorized by this Act to be served shall also be sufficiently served, if it is sent by post in a registered letter addressed to the lessee, lessor, mortgagee, mortgagor, or other person to be served, by name, at the aforesaid place of abode or business, office, or counting-house, and if that letter is not returned through the post-office undelivered; and that service shall be deemed to be made at the time at which the registered letter would in the ordinary course be delivered.

(5.) This section does not apply to notices served in proceedings in the Court.

Short title of 5 & 6 Will. IV. c. 62.

68. The Act described in Part II. of the First Schedule to this Act shall, by virtue of this Act, have the short title of the Statutory Declarations Act, 1835, and may be cited by that short title in any declaration made for any purpose under or by virtue of that Act, or in any other document, or in any act of Parliament.

XVI.—Court; Procedure; Orders.

Regulations respecting payments into Court and applications.

69.—(1.) All matters within the jurisdiction of the Court under this Act shall, subject to the Acts regulating the Court, be assigned to the Chancery Division of the Court.

(2.) Payment of money into Court shall effectually exonerate therefrom the person making the payment. 44 & 45 Vict. c. 41.

(3.) Every application to the Court shall, except where it is otherwise expressed, be by summons at Chambers.

(4.) On an application by a purchaser notice shall be served in the first instance on the vendor.

(5.) On an application by a vendor notice shall be served in the first instance on the purchaser.

(6.) On any application notice shall be served on such persons, if any, as the Court thinks fit.

(7.) The Court shall have full power and discretion to make such order as it thinks fit respecting the costs, charges, or expenses of all or any of the parties to any application.

(8.) General rules for purposes of this Act shall be deemed Rules of Court within section seventeen of the Appellate Jurisdiction Act, 1876, and may be made accordingly. 39 & 40 Vict. c. 59, s. 17.

(9.) The powers of the Court may, as regards land in the County Palatine of Lancaster, be exercised also by the Court of Chancery of the County Palatine; and Rules for regulating proceedings in that Court shall be from time to time made by the Chancellor of the Duchy of Lancaster, with the advice and consent of a judge of the High Court acting in the Chancery Division, and of the Vice-Chancellor of the County Palatine.

(10.) General Rules, and Rules of the Court of Chancery of the County Palatine, under this Act may be made at any time after the passing of this Act, to take effect on or after the commencement of this Act.

70.—(1.) An order of the Court under any statutory or other jurisdiction shall not as against a purchaser, be invalidated on the ground of want of jurisdiction, or of want of any concurrence, consent, notice, or service, whether the purchaser has notice of any such want or not. Orders of Court conclusive.

(2.) This section shall have effect with respect to any lease, sale, or other act under the authority of the Court, and purporting to be in pursuance of the Settled Estates Act, 1877, notwithstanding the exception in section forty of that Act, or to be in pursuance of any former Act repealed by that Act, notwithstanding any exception in such former Act. 40 & 41 Vict. c. 18, s. 40.

(3.) This section applies to all orders made before or after the commencement of this Act, except any order which has before the commencement of this Act been set aside or determined to be invalid on any ground, and except any order as regards which an action or proceeding is at the commencement of this Act pending for having it set aside or determined to be invalid.

44 & 45 Vict. c. 41.

XVII.—Repeals.

Repeal of enactments in Part III. of Second Schedule; restriction on all repeals.

71.—(1.) The enactments described in Part III. of the Second Schedule to this Act are hereby repealed.

(2.) The repeal by this Act of any enactment shall not affect the validity or invalidity, or any operation, effect, or consequence, of any instrument executed or made, or of anything done or suffered, before the commencement of this Act, or any action, proceeding, or thing then pending or uncompleted; and every such action, proceeding, and thing may be carried on and completed as if there had been no such repeal in this Act; but this provision shall not be construed as qualifying the provision of this Act relating to section forty of the Settled Estates Act, 1877, or any former Act repealed by that Act.

XVIII.—Ireland.

Modifications respecting Ireland.

72.—(1.) In the application of this Act to Ireland the foregoing provisions shall be modified as in this section provided.

(2.) The Court shall be Her Majesty's High Court of Justice in Ireland.

(3.) All matters within the jurisdiction of that Court shall, subject to the Acts regulating that Court, be assigned to the Chancery Division of that Court; but General Rules under this Act may direct that any of those matters be assigned to the Land Judges of that Division.

(4.) The proper office of the Supreme Court of Judicature in Ireland shall be substituted for the Central Office of the Supreme Court of Judicature.

40 & 41 Vict. c. 57, s. 69.

(5.) General Rules for purposes of this Act for Ireland shall be deemed Rules of Court within the Supreme Court of Judicature Act (Ireland), 1877, and may be made accordingly, at any time after the passing of this Act, to take effect on or after the commencement of this Act.

Death of bare trustee intestate, &c. 37 & 38 Vict. c. 78.

73.—(1.) Section five of the Vendor and Purchaser Act, 1874, is hereby repealed from and after the commencement of this Act, as regards cases of death thereafter happening; and section seven of the Vendor and Purchaser Act, 1874, is hereby repealed as from the date at which it came into operation.

(2.) This section extends to Ireland only.

SCHEDULES.

THE FIRST SCHEDULE (a).

ACTS AFFECTED.

PART I.

1 & 2 Vict. c. 110.—An Act for abolishing arrest on mesne process in civil actions except in certain cases; for extending the remedies of creditors against the property of debtors; and for amending the laws for the relief of insolvent debtors in England.

2 & 3 Vict. c. 11.—An Act for the better protection of purchasers against judgments, crown debts, lis pendens, and fiats in bankruptcy.

18 & 19 Vict. c. 15.—An Act for the better protection of purchasers against judgments, crown debts, cases of lis pendens, and life annuities or rentcharges.

22 & 23 Vict. c. 35.—An Act to further amend the law of property and to relieve trustees.

23 & 24 Vict. c. 38.—An Act to further amend the law of property.

23 & 24 Vict. c. 115.—An Act to simplify and amend the practice as to the entry of satisfaction on Crown debts and on judgments.

27 & 28 Vict. c. 112.—An Act to amend the law relating to future judgments, statutes, and recognizances.

28 & 29 Vict. c. 104.—The Crown Suits, &c., Act, 1865.

31 & 32 Vict. c. 54.—The Judgments Extension Act, 1868.

PART II.

(See s. 68, *ante*.)

5 & 6 Will. IV. c. 62.—An Act to repeal an Act of the present session of Parliament, intituled "An Act for the more effectual abolition of oaths and affirmations taken and made in various Departments of the State, and to substitute declarations in lieu thereof; and for the more entire suppression of voluntary and extra-judicial oaths and affidavits;" and to make other provisions for the abolition of unnecessary oaths.

THE SECOND SCHEDULE.

REPEALS.

A description or citation of a portion of an Act is inclusive of the words, section, or other part, first or last mentioned, or otherwise referred to as forming the beginning, or as forming the end, of the portion comprised in the description or citation.

PART I.

22 & 23 Vict. c. 35 . in part.	An Act to further amend the law of property and to relieve trustees . . . . . Sections four to nine.	in part; namely,—
23 & 24 Vict. c. 126 . in part.	The Common Law Procedure Act, 1860 . . . . . Section two.	in part; namely,—

(a) See Conveyancing Act, 1882, s. 2.

44 & 45 Vict. c. 41.

PART II.

15 & 16 Vict. c. 86 in part.	An Act to Amend the practice and course of proceeding in the High Court of Chancery . . . Section forty-eight.	in part; namely,—

PART III.

8 & 9 Vict. c. 119 .	An Act to facilitate the conveyance of real property.	
23 & 24 Vict. c. 145 in part.	An Act to give to trustees, mortgagees, and others certain powers now commonly inserted in settlements, mortgages, and wills . . Parts II. and III. (sections eleven to thirty).	in part; namely,—

THE THIRD SCHEDULE.

STATUTORY MORTGAGE.

PART I.

Deed of Statutory Mortgage.

THIS INDENTURE made by way of statutory mortgage the day of 1882 between *A.* of [*&c.*] of the one part and *M.* of [*&c.*] of the other part WITNESSETH that in consideration of the sum of £ now paid to *A.* by *M.* of which sum *A.* hereby acknowledges the receipt *A.* as mortgagor and as beneficial owner hereby conveys to *M.* All that [*&c.*] To hold to and to the use of *M.* in fee simple for securing payment on the day of 1883 of the principal sum of £ as the mortgage money with interest thereon at the rate of [*four*] per centum per annum.

In witness, &c.

*** *Variations in this and subsequent forms to be made, if required, for leasehold land, or other matter.*

PART II.

(A.)

Deed of Statutory Transfer, Mortgagor not joining.

THIS INDENTURE made by way of statutory transfer of mortgage the day of 1883 between *M.* of [*&c.*] of the one part and *T.* of [*&c.*] of the other part supplemental to an indenture made by way of statutory mortgage dated the day of 1882 and made between [*&c.*] WITNESSETH that in consideration of the sum of £ now paid to *M.* by *T.* being the aggregate amount of £ mortgage money and £ interest due in respect of the said mortgage of which sum *M.* hereby acknowledges the receipt *M.* as mortgagee hereby conveys and transfers to *T.* the benefit of the said mortgage.

In witness, &c.

(B.)

Deed of Statutory Transfer, a Covenantor joining.

THIS INDENTURE made by way of statutory transfer of mortgage the day of 1883 between *A.* of [*&c.*] of the first part *B.* of [*&c.*] of the second part and *C.* of [*&c.*] of the third part supplemental to an indenture made by way of statutory mortgage dated the day of 1882 and made between [*&c.*] WITNESSETH that in consideration of the sum of £ now paid to *A.* by *C.* being the mortgage money due in respect of the said mortgage no interest being now due and payable thereon of which sum *A.* hereby acknowledges the receipt *A.* as mortgagee with the concurrence of *B.* who joins herein as covenantor hereby conveys and transfers to *C.* the benefit of the said mortgage.

In witness, &c.

(C.)

Statutory Transfer and Statutory Mortgage Combined.

THIS INDENTURE made by way of statutory transfer of mortgage and statutory mortgage the day of 1883 between *A.* of [*&c.*] of the first part *B.* of [*&c.*] of the second part and *C.* of [*&c.*] of the third part supplemental to an indenture made by way of statutory mortgage dated the day of 1882 and made between [*&c.*] WHEREAS the principal sum of £ only remains due in respect of the said mortgage as the mortgage money and no interest is now due and payable thereon AND WHEREAS *B.* is seised in fee simple of the land comprised in the said mortgage subject to that mortgage NOW THIS INDENTURE WITNESSETH that in consideration of the sum of £ now paid to *A.* by *C.* of which sum *A.* hereby acknowledges the receipt and *B.* hereby acknowledges the payment and receipt as aforesaid * *A.* as mortgagee hereby conveys and transfers to *C.* the benefit of the said mortgage AND THIS INDENTUEE ALSO WITNESSETH that for the same consideration *A.* as mortgagee and according to his estate and by direction of *B.* hereby conveys and *B.* as beneficial owner hereby conveys and confirms to *C.* All that [*&c.*] To hold to and to the use of *C.* in fee simple for securing payment on the day of 1882 of † the sum of £ as the mortgage money with interest thereon at the rate of [*four*] per centum per annum.

In witness, &c.

[*Or, in case of further advance, after* aforesaid at * *insert* and also in consideration of the further sum of £ now paid by *C.* to *B.* of which sum *B.* hereby acknowledges the receipt, *and after* of *at* † *insert* the sums of £ and £ making together]

*** *Variations to be made, as required, in case of the deed being made by indorsement, or in respect of any other thing.*

PART III.

Deed of Statutory Re-conveyance of Mortgage.

THIS INDENTURE made by way of statutory re-conveyance of mortgage the day of 1884 between *C.* of [*&c.*] of the one part and *B.* of [*&c.*] of the other part supplemental to an indenture made by way of statutory transfer of mortgage dated the day of 1883 and made between [*&c.*] WITNESSETH that in consideration of all principal money and interest due under that indenture having been paid of which principal and interest *C.* hereby acknowledges the receipt *C.* as mortgagee hereby conveys to *B.* all the lands and hereditaments

now vested in *C.* under the said indenture To hold to and to the use of *B.* in fee simple discharged from all principal money and interest secured by and from all claims and demands under the said indenture.

In witness, &c.

*** *Variations as noted above.*

THE FOURTH SCHEDULE.

SHORT FORMS OF DEEDS.

I.—*Mortgage.*

THIS INDENTURE OF MORTGAGE made the day of 1882 between *A.* of [*&c.*] of the one part and *B.* of [*&c.*] and *C.* of [*&c.*] of the other part WITNESSETH that in consideration of the sum of £ paid to *A.* by *B.* and *C.* out of money belonging to them on a joint account of which sum *A.* hereby acknowledges the receipt *A.* hereby covenants with *B.* and *C.* to pay to them on the day of 1882 the sum of £ with interest thereon in the meantime at the rate of [*four*] per centum per annum and also as long after that day as any principal money remains due under this mortgage to pay to *B.* and *C.* interest thereon at the same rate by equal half-yearly payments on the day of and the day of AND THIS INDENTURE ALSO WITNESSETH that for the same consideration *A.* as beneficial owner hereby conveys to *B.* and *C.* All that [*&c.*] To hold to and to the use of *B.* and *C.* in fee simple subject to the proviso for redemption following (namely) that if *A.* or any person claiming under him shall on the day of 1882 pay to *B.* and *C.* the sum of £ and interest thereon at the rate aforesaid then *B.* and *C.* or the persons claiming under them will at the request and cost of *A.* or the persons claiming under him re-convey the premises to *A.* or the persons claiming under him AND *A.* hereby covenants with *B.* as follows [*here add covenant as to fire insurance or other special covenant required.*]

In witness, &c.

II.—*Further Charge.*

THIS INDENTURE made the day of 18 between [*the same parties as the foregoing mortgage*] and supplemental to an indenture of mortgage dated the day of 18 and made between the same parties for securing the sum of £ and interest at [*four*] per centum per annum on property at [*&c.*] WITNESSETH that in consideration of the further sum of £ paid to *A.* by *B.* and *C.* out of money belonging to them on a joint account [*add receipt and covenant as in the foregoing mortgage*] and further that all the property comprised in the before-mentioned indenture of mortgage shall stand charged with the payment to *B.* and *C.* of the sum of £ and the interest thereon hereinbefore covenanted to be paid as well as the sum of £ and interest secured by the same indenture.

In witness, &c.

III.—*Conveyance on Sale.*

THIS INDENTURE made the day of 1883 between *A.* of [*&c.*] of the 1st part *B.* of [*&c.*] and *C.* of [*&c.*] of the 2nd part and *M.* of [*&c.*] of the 3rd part WHEREAS by an indenture dated [*&c.*] and made between [*&c.*] the

lands hereinafter mentioned were conveyed by *A.* to *B.* and *C.* in fee simple by way of mortgage for securing £ and interest and by a supplemental indenture dated [&c.] and made between the same parties those lands were charged by *A.* with the payment to *B.* and *C.* of the further sum of £ and interest thereon AND WHEREAS a principal sum of £ remains due under the two before-mentioned indentures but all interest thereon has been paid as *B.* and *C.* hereby acknowledge NOW THIS INDENTURE WITNESSETH that in consideration of the sum of £ paid by the direction of *A.* to *B.* and *C.* and of the sum of £ paid to *A.* those two sums making together the total sum of £ paid by *M.* for the purchase of the fee simple of the lands hereinafter mentioned of which sum of £ *B.* and *C.* hereby acknowledge the receipt and of which total sum of £ *A.* hereby acknowledges the payment and receipt in manner before mentioned *B.* and *C.* as mortgagees and by the direction of *A.* as beneficial owner hereby convey and *A.* as beneficial owner hereby conveys and confirms to *M.* All that [*&c.*] To hold to and to the use of *M.* in fee simple discharged from all money secured by and from all claims under the before-mentioned indentures [*Add, if required,* And *A.* hereby acknowledges the right of *M.* to production of the documents of title mentioned in the Schedule hereto and to delivery of copies thereof and hereby undertakes for the safe custody thereof].

In witness, &c.

[The Schedule above referred to.

To contain list of documents retained by A.]

IV.—*Marriage Settlement.*

THIS INDENTURE made the day of 1882 between *John M.* of [*&c.*] of the 1st part *Jane S.* of [*&c.*] of the 2nd part and *X.* of [*&c.*] and *Y.* of [*&c.*] of the 3rd part WITNESSETH that in consideration of the intended marriage between *John M.* and *Jane S. John M.* as settlor hereby conveys to *X.* and *Y.* All that [*&c.*] To hold to *X.* and *Y.* in fee simple to the use of *John M.* in fee simple until the marriage and after the marriage to the use of *John M.* during his life without impeachment of waste with remainder after his death to the use that *Jane S.* if she survives him may receive during the rest of her life a yearly jointure rentcharge of £ to commence from his death and to be paid by equal half-yearly payments the first thereof to be made at the end of six calendar months from his death if she is then living or if not a proportional part to be paid at her death and subject to the before-mentioned rentcharge to the use of *X.* and *Y.* for a term of five hundred years without impeachment of waste on the trusts hereinafter declared and subject thereto to the use of the first and other sons of *John M.* and *Jane S.* successively according to seniority in tail male with remainder [*insert here, if thought desirable,* to the use of the same first and other sons successively according to seniority in tail with remainder] to the use of all the daughters of *John M.* and *Jane S.* in equal shares as tenants in common in tail with cross remainders between them in tail with remainder to the use of *John M.* in fee simple [*Insert trusts of term of* 500 *years for raising portions; also, if required, power to charge jointure and portions on a future marriage; also powers of sale, exchange, and partition, and other powers and provisions, if and as desired.*]

In witness, &c.

45 & 46 Vict. c. 39.

THE CONVEYANCING ACT, 1882.

[45 & 46 VICT. CH. 39.]

An Act for further improving the Practice of Conveyancing; and for other Purposes. [10th August, 1882.]

BE it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same as follows:

Preliminary.

Short titles; commencement; extent; interpretation.

44 & 45 Vict. c. 41.

1.—(1.) This Act may be cited as the Conveyancing Act, 1882; and the Conveyancing and Law of Property Act, 1881 (in this Act referred to as the Conveyancing Act of 1881) and this Act may be cited together as the Conveyancing Acts, 1881, 1882.

(2.) This Act, except where it is otherwise expressed, shall commence and take effect from and immediately after the thirty-first day of December one thousand eight hundred and eighty-two, which time is in this Act referred to as the commencement of this Act.

(3.) This Act does not extend to Scotland.

(4.) In this Act and in the Schedule thereto—

(i.) Property includes real and personal property, and any debt, and any thing in action, and any other right or interest in the nature of property, whether in possession or not;

(ii.) Purchaser includes a lessee or mortgagee, or an intending purchaser, lessee, or mortgagee, or other person, who, for valuable consideration, takes or deals for property, and purchase has a meaning corresponding with that of purchaser;

3 & 4 Will. IV. c. 74.

4 & 5 Will. IV. c. 92.

(iii.) The Act of the session of the third and fourth years of King William the Fourth (chapter seventy-four) "for the abolition of "Fines and Recoveries, and for the substitution of more simple "modes of Assurance" is referred to as the Fines and Recoveries Act; and the Act of the session of the fourth and fifth years of King William the Fourth (chapter ninety-two) "for the abolition "of Fines and Recoveries, and for the substitution of more simple "modes of Assurance in Ireland" is referred to as the Fines and Recoveries (Ireland) Act.

Searches.

Official negative and other certificates of searches for judgments, crown debts, &c.

2.—(1.) Where any person requires, for purposes of this section, search to be made in the Central Office of the Supreme Court of Judicature for entries of judgments, deeds, or other matters or documents, whereof entries are required or allowed to be made in that office by any

Act described in Part I. of the First Schedule to the Conveyancing Act of 1881, or by any other Act, he may deliver in the office a requisition in that behalf, referring to this section. 45 & 46 Vict. c. 39.

(2.) Thereupon the proper officer shall diligently make the search required, and shall make and file in the office a certificate setting forth the result thereof; and office copies of that certificate shall be issued on requisition, and an office copy shall be evidence of the certificate.

(3.) In favour of a purchaser, as against persons interested under or in respect of judgments, deeds, or other matters or documents, whereof entries are required or allowed as aforesaid, the certificate, according to the tenour thereof, shall be conclusive, affirmatively or negatively, as the case may be.

(4.) Every requisition under this section shall be in writing, signed by the person making the same, specifying the name against which he desires search to be made, or in relation to which he requires an office copy certificate of result of search, and other sufficient particulars; and the person making any such requisition shall not be entitled to a search, or an office copy certificate, until he has satisfied the proper officer that the same is required for the purposes of this section.

(5.) General Rules shall be made for purposes of this section, prescribing forms and contents of requisitions and certificates, and regulating the practice of the office, and prescribing, with the concurrence of the Commissioners of Her Majesty's Treasury, the fees to be taken therein; which Rules shall be deemed Rules of Court within section seventeen of the Appellate Jurisdiction Act, 1876, as altered by section nineteen of the Supreme Court of Judicature Act, 1881, and may be made, at any time after the passing of this Act, to take effect on or after the commencement of this Act. 39 & 40 Vict. c. 59. 44 & 45 Vict. c. 68.

(6.) If any officer, clerk, or person employed in the office commits or is party or privy to, any act of fraud or collusion, or is wilfully negligent, in the making of or otherwise in relation to any certificate or office copy under this section, he shall be guilty of a misdemeanor.

(7.) Nothing in this section or in any Rule made thereunder shall take away, abridge, or prejudicially affect any right which any person may have independently of this section to make any search in the office; and every such search may be made as if this section or any such Rule had not been enacted or made.

(8.) Where a solicitor obtains an office copy certificate of result of search under this section, he shall not be answerable in respect of any loss that may arise from error in the certificate.

(9.) Where the solicitor is acting for trustees, executors, agents, or other persons in a fiduciary position, those persons also shall not be so answerable.

(10.) Where such persons obtain such an office copy without a solicitor, they shall also be protected in like manner.

45 & 46 Vict. c. 39.

3 & 4 Will. IV. c. 74.

(11.) Nothing in this section applies to deeds inrolled under the Fines and Recoveries Act, or under any other Act, or under any statutory Rule.

(12.) This section does not extend to Ireland.

Notice.

Restriction on constructive notice.

3.—(1.) A purchaser shall not be prejudicially affected by notice of any instrument, fact, or thing unless—

(i.) It is within his own knowledge, or would have come to his knowledge if such inquiries and inspections had been made as ought reasonably to have been made by him ; or

(ii.) In the same transaction with respect to which a question of notice to the purchaser arises, it has come to the knowledge of his counsel, as such, or of his solicitor, or other agent, as such, or would have come to the knowledge of his solicitor, or other agent, as such, if such inquiries and inspections had been made as ought reasonably to have been made by the solicitor or other agent.

(2.) This section shall not exempt a purchaser from any liability under, or any obligation to perform or observe, any covenant, condition, provision, or restriction contained in any instrument under which his title is derived, mediately or immediately ; and such liability or obligation may be enforced in the same manner and to the same extent as if this section had not been enacted.

(3.) A purchaser shall not by reason of anything in this section be affected by notice in any case where he would not have been so affected if this section had not been enacted.

(4.) This section applies to purchases made either before or after the commencement of this Act ; save that, where an action is pending at the commencement of this Act, the rights of the parties shall not be affected by this section.

Leases.

Contract for lease not part of title to lease.

4.—(1.) Where a lease is made under a power contained in a settlement, will, Act of Parliament, or other instrument, any preliminary contract for or relating to the lease shall not, for the purpose of the deduction of title to an intended assign, form part of the title, or evidence of the title, to the lease.

(2.) This section applies to leases made either before or after the commencement of this Act.

Separate Trustees.

Appointment of separate sets of trustees.

5.—(1.) On an appointment of new trustees, a separate set of trustees may be appointed for any part of the trust property held on trusts distinct from those relating to any other part or parts of the trust

property; or, if only one trustee was originally appointed, then one separate trustee may be so appointed for the first-mentioned part.

45 & 46 Vict. c. 39.

(2.) This section applies to trusts created either before or after the commencement of this Act.

Powers.

Disclaimer of power by trustees.

6.—(1.) A person to whom any power, whether coupled with an interest or not, is given, may, by deed, disclaim the power; and, after disclaimer, shall not be capable of exercising or joining in the exercise of the power.

(2.) On such disclaimer, the power may be exercised by the other or others, or the survivors or survivor of the others, of the persons to whom the power is given, unless the contrary is expressed in the instrument creating the power.

(3.) This section applies to powers created by instruments coming into operation either before or after the commencement of this Act.

Married Women.

Acknowledgment of deeds by married women.

7.—(1.) In section seventy-nine of the Fines and Recoveries Act, and section seventy of the Fines and Recoveries (Ireland) Act, there shall, by virtue of this Act, be substituted for the words "two of the "perpetual commissioners, or two special commissioners," the words "one of the perpetual commissioners, or one special commissioner;" and in section eighty-three of the Fines and Recoveries Act, and section seventy-four of the Fines and Recoveries (Ireland) Act, there shall, by virtue of this Act, be substituted for the word "persons" the word "person," and for the word "commissioners" the words "a commissioner;" and all other provisions of those Acts, and all other enactments having reference in any manner to the sections aforesaid, shall be read and have effect accordingly.

(2.) Where the memorandum of acknowledgment by a married woman of a deed purports to be signed by a person authorized to take the acknowledgment, the deed shall, as regards the execution thereof by the married woman, take effect at the time of acknowledgment, and shall be conclusively taken to have been duly acknowledged.

(3.) A deed acknowledged before or after the commencement of this Act by a married woman, before a Judge of the High Court of Justice in England or Ireland, or before a judge of a County Court in England, or before a chairman in Ireland, or before a perpetual commissioner or a special commissioner, shall not be impeached or impeachable by reason only that such judge, chairman, or commissioner was interested or concerned either as a party, or as solicitor, or clerk to the solicitor for one of the parties, or otherwise, in the transaction giving occasion for the acknowledgment; and general rules shall be made for preventing any

45 & 46 Vict. c. 39.

person interested or concerned as aforesaid from taking an acknowledgment, but no such rule shall make invalid any acknowledgment; and those rules shall, as regards England, be deemed rules of Court within section seventeen of the Appellate Jurisdiction Act, 1876, as altered by section nineteen of the Supreme Court of Judicature Act, 1881, and shall, as regards Ireland, be deemed rules of Court within the Supreme Court of Judicature Act (Ireland), 1877, and may be made accordingly, for England and Ireland respectively, at any time after the passing of this Act, to take effect on or after the commencement of this Act.

39 & 40 Vict. c. 59. 44 & 45 Vict. c. 68. 40 & 41 Vict. c. 57.

(4.) The enactments described in the schedule to this Act are hereby repealed.

(5.) The foregoing provisions of this section, including the repeal therein, apply only to the execution of deeds by married women after the commencement of this Act.

(6.) Notwithstanding the repeal or any other thing in this section, the certificate, if not lodged before the commencement of this Act, of the taking of an acknowledgment by a married woman of a deed executed before the commencement of this Act, with any affidavit relating thereto, shall be lodged, examined, and filed in the like manner and with the like effects and consequences as if this section had not been enacted.

(7.) There shall continue to be kept in the proper office of the Supreme Court of Judicature an index to all certificates of acknowledgments of deeds by married women lodged therein, before or after the commencement of this Act, containing the names of the married women and their husbands, alphabetically arranged, and the dates of the certificates and of the deeds to which they respectively relate, and other particulars found convenient; and every such certificate lodged after the commencement of this Act shall be entered in the index as soon as may be after the certificate is filed.

(8.) An office copy of any such certificate filed before or after the commencement of this Act shall be delivered to any person applying for the same; and every such office copy shall be received as evidence of the acknowledgment of the deed to which the certificate refers.

Powers of Attorney.

Effect of power of attorney, for value, made absolutely irrevocable.

8.—(1.) If a power of attorney, given for valuable consideration, is in the instrument creating the power expressed to be irrevocable, then, in favour of a purchaser,—

(i.) The power shall not be revoked at any time, either by anything done by the donor of the power without the concurrence of the donee of the power, or by the death, marriage, lunacy, unsoundness of mind, or bankruptcy of the donor of the power; and

(ii.) Any act done at any time by the donee of the power in pursuance of the power, shall be as valid as if anything done by the donor

of the power without the concurrence of the donee of the power, or the death, marriage, lunacy, unsoundness of mind, or bankruptcy of the donor of the power, had not been done or happened; and

(iii.) Neither the donee of the power nor the purchaser shall at any time be prejudicially affected by notice of anything done by the donor of the power, without the concurrence of the donee of the power, or of the death, marriage, lunacy, unsoundness of mind, or bankruptcy of the donor of the power.

(2.) This section applies only to powers of attorney created by instruments executed after the commencement of this Act.

Effect of power of attorney, for value or not, made irrevocable for fixed time.

9.—(1.) If a power of attorney, whether given for valuable consideration or not, is in the instrument creating the power expressed to be irrevocable for a fixed time therein specified, not exceeding one year from the date of the instrument, then, in favour of a purchaser,—

(i.) The power shall not be revoked, for and during that fixed time, either by anything done by the donor of the power without the concurrence of the donee of the power, or by the death, marriage, lunacy, unsoundness of mind, or bankruptcy of the donor of the power; and

(ii.) Any act done within that fixed time, by the donee of the power, in pursuance of the power, shall be as valid as if anything done by the donor of the power without the concurrence of the donee of the power, or the death, marriage, lunacy, unsoundness of mind, or bankruptcy of the donor of the power, had not been done or happened; and

(iii.) Neither the donee of the power, nor the purchaser, shall at any time be prejudicially affected by notice either during or after that fixed time of anything done by the donor of the power during that fixed time, without the concurrence of the donee of the power, or of the death, marriage, lunacy, unsoundness of mind, or bankruptcy of the donor of the power within that fixed time.

(2.) This section applies only to powers of attorney created by instruments executed after the commencement of this Act.

Executory Limitations.

Restriction on executory limitations.

10.—(1.) Where there is a person entitled to land for an estate in fee or for a term of years absolute or determinable on life, or for a term of life, with an executory limitation over on default or failure of all or any of his issue, whether within or at any specified period or time or not, that executory limitation shall be or become void and incapable of taking effect, if and as soon as there is living any issue who has attained the age of twenty-one years, of the class on default of failure whereof the limitation over was to take effect.

(2.) This section applies only where the executory limitation is con-

45 & 46 Vict. c. 39.

tained in an instrument coming into operation after the commencement of this Act.

Long Terms.

Amendment of enactment respecting long terms.

11. Section sixty-five of the Conveyancing Act of 1881 shall apply to and include, and shall be deemed to have always applied to and included, every such term as in that section mentioned, whether having as the immediate reversion thereon the freehold or not; but not

(i.) Any term liable to be determined by re-entry for condition broken; or

(ii.) Any term created by sub-demise out of a superior term, itself incapable of being enlarged into a fee simple.

Mortgages.

Reconveyance on mortgage.

12. The right of the mortgagor, under section fifteen of the Conveyancing Act of 1881, to require a mortgagee, instead of reconveying, to assign the mortgage debt and convey the mortgaged property to a third person, shall belong to and be capable of being enforced by each incumbrancer, or by the mortgagor, notwithstanding any intermediate incumbrance; but a requisition of an incumbrancer shall prevail over a requisition of the mortgagor, and, as between incumbrancers, a requisition of a prior incumbrancer shall prevail over a requisition of a subsequent incumbrancer.

Saving.

Restriction on repeals in this Act.

13. The repeal by this Act of any enactment shall not affect any right accrued or obligation incurred thereunder before the commencement of this Act; nor shall the same affect the validity or invalidity, or any operation, effect, or consequence, of any instrument, executed or made, or of anything done or suffered, before the commencement of this Act; nor shall the same affect any action, proceeding, or thing then pending or uncompleted; and every such action, proceeding, and thing may be carried on and completed as if there had been no such repeal in this Act.

SCHEDULE.

REPEALS.

3 & 4 Will. IV. c. 74 in part.	The Fines and Recoveries Act, in part: namely,— Section eighty-four, from and including the words "and the same Judge," to the end of that section. Sections eighty-five to eighty-eight inclusive.	Section 7 (4).
4 & 5 Will. IV. c. 92 in part.	The Fines and Recoveries (Ireland) Act . . . . . in part; namely,— Section seventy-five, from and including the words "and the same Judge," to the end of that section. Sections seventy-six to seventy-nine, inclusive.	
17 & 18 Vict. c. 75	An Act to remove doubts concerning the due acknowledgments of deeds by married women in certain cases.	
41 & 42 Vict. c. 23	The Acknowledgment of Deeds by Married Women (Ireland) Act, 1878.	

THE SETTLED LAND ACT, 1882.

[45 & 46 VICT. CH. 38.]

An Act for facilitating Sales, Leases, and other dispositions of Settled Land, and for promoting the execution of Improvements thereon.

[10th August, 1882.]

BE it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

I.—PRELIMINARY.

1.—(1.) This Act may be cited as the Settled Land Act, 1882.

Short title; commencement; extent.

(2.) This Act, except where it is otherwise expressed, shall commence and take effect from and immediately after the thirty-first day of December one thousand eight hundred and eighty-two, which time is in this Act referred to as the commencement of this Act.

(3.) This Act does not extend to Scotland.

45 & 46 Vict. c. 38.

Definition of settlement, tenant for life, &c.

II.—Definitions.

2.—(1.) Any deed, will, agreement for a settlement, or other agreement, covenant to surrender, copy of court roll, Act of Parliament, or other instrument, or any number of instruments, whether made or passed before or after, or partly before and partly after, the commencement of this Act, under or by virtue of which instrument or instruments any land, or any estate or interest in land, stands for the time being limited to or in trust for any persons by way of succession, creates or is for purposes of this Act a settlement, and is in this Act referred to as a settlement, or as the settlement, as the case requires.

(2.) An estate or interest in remainder or reversion not disposed of by a settlement, and reverting to the settlor or descending to the testator's heir, is for purposes of this Act an estate or interest coming to the settlor or heir under or by virtue of the settlement, and comprised in the subject of the settlement.

(3.) Land, and any estate or interest therein, which is the subject of a settlement, is for purposes of this Act settled land, and is, in relation to the settlement, referred to in this Act as the settled land.

(4.) The determination of the question whether land is settled land, for purposes of this Act, or not, is governed by the state of facts, and the limitations of the settlement, at the time of the settlement taking effect.

(5.) The person who is for the time being, under a settlement, beneficially entitled to possession of settled land, for his life, is for purposes of this Act the tenant for life of that land, and the tenant for life under that settlement.

(6.) If, in any case, there are two or more persons so entitled as tenants in common, or as joint tenants, or for other concurrent estates or interests, they together constitute the tenant for life for purposes of this Act.

(7.) A person being tenant for life within the foregoing definitions shall be deemed to be such notwithstanding that, under the settlement or otherwise, the settled land, or his estate or interest therein, is incumbered or charged in any manner or to any extent.

(8.) The persons, if any, who are for the time being, under a settlement, trustees with power of sale of settled land, or with power of consent to or approval of the exercise of such a power of sale, or if under a settlement there are no such trustees, then the persons, if any, for the time being, who are by the settlement declared to be trustees thereof for purposes of this Act, are for purposes of this Act trustees of the settlement.

(9.) Capital money arising under this Act, and receivable for the trusts and purposes of the settlement, is in this Act referred to as capital money arising under this Act,

(10.) In this Act— 45 & 46 Vict. c. 38.

(i.) Land includes incorporeal hereditaments, also an undivided share in land; income includes rents and profits; and possession includes receipt of income:

(ii.) Rent includes yearly or other rent, and toll, duty, royalty, or other reservation, by the acre, or the ton, or otherwise; and, in relation to rent, payment includes delivery; and fine includes premium or fore-gift, and any payment, consideration, or benefit in the nature of a fine, premium, or fore-gift:

(iii.) Building purposes include the erecting and the improving of, and the adding to, and the repairing of buildings; and a building lease is a lease for any building purposes or purposes connected therewith:

(iv.) Mines and minerals mean mines and minerals whether already opened or in work or not, and include all minerals and substances in, on, or under the land, obtainable by underground or by surface working; and mining purposes include the sinking and searching for, winning, working, getting, making merchantable, smelting or otherwise converting or working for the purposes of any manufacture, carrying away, and disposing of mines and minerals, in or under the settled land, or any other land, and the erection of buildings, and the execution of engineering and other works, suitable for those purposes; and a mining lease is a lease for any mining purposes or purposes connected therewith, and includes a grant or licence for any mining purposes:

(v.) Manor includes lordship, and reputed manor or lordship:

(vi.) Steward includes deputy steward, or other proper officer, of a manor:

(vii.) Will includes codicil, and other testamentary instrument, and a writing in the nature of a will:

(viii.) Securities include stocks, funds, and shares:

(ix.) Her Majesty's High Court of Justice is referred to as the Court:

(x.) The Land Commissioners for England as constituted by this Act are referred to as the Land Commissioners:

(xi.) Person includes corporation.

III.—Sale; Enfranchisement; Exchange; Partition.

General Powers and Regulations.

Powers to tenant for life to sell, &c.

3. A tenant for life—

(i.) May sell the settled land, or any part thereof, or any easement, right, or privilege of any kind, over or in relation to the same; and

(ii.) Where the settlement comprises a manor,—may sell the seignory of any freehold land within the manor, or the freehold and inheritance of any copyhold or customary land, parcel of the

45 & 46 Vict. c. 38.

manor, with or without any exception or reservation of all or any mines or minerals, or of any rights or powers relative to mining purposes, so as in every such case to effect an enfranchisement; and

(iii.) May make an exchange of the settled land, or any part thereof, for other land, including an exchange in consideration of money paid for equality of exchange; and

(iv.) Where the settlement comprises an undivided share in land, or, under the settlement, the settled land has come to be held in undivided shares,—may concur in making partition of the entirety, including a partition in consideration of money paid for equality of partition.

Regulations respecting sale, enfranchisement, exchange, and partition.

4.—(1.) Every sale shall be made at the best price that can reasonably be obtained.

(2.) Every exchange and every partition shall be made for the best consideration in land or in land and money that can reasonably be obtained.

(3.) A sale may be made in one lot or in several lots, and either by auction or by private contract.

(4.) On a sale the tenant for life may fix reserve biddings, and buy in at an auction.

(5.) A sale, exchange, or partition may be made subject to any stipulations respecting title, or evidence of title, or other things.

(6.) On a sale, exchange, or partition, any restriction or reservation with respect to building on or other user of land, or with respect to mines and minerals, or with respect to or for the purpose of the more beneficial working thereof, or with respect to any other thing, may be imposed or reserved and made binding, as far as the law permits, by covenant, condition, or otherwise, on the tenant for life and the settled land, or any part thereof, or on the other party and any land sold or given in exchange or on partition to him.

(7.) An enfranchisement may be made with or without a re-grant of any right of common or other right, easement, or privilege theretofore appendant or appurtenant to or held or enjoyed with the land enfranchised, or reputed so to be.

(8.) Settled land in England shall not be given in exchange for land out of England.

Special Powers.

Transfer of incumbrances on land sold, &c.

5. Where, on a sale, exchange, or partition there is an incumbrance affecting land sold or given in exchange or on partition, the tenant for life, with the consent of the incumbrancer, may charge that incumbrance on any other part of the settled land, whether already charged therewith or not, in exoneration of the part sold or so given, and, by conveyance of the fee simple, or other estate or interest the subject of the settlement,

or by creation of a term of years in the settled land, or otherwise, make provision accordingly.

45 & 46 Vict. c. 38.

IV.—Leases.

General Powers and Regulations.

Power for tenant for life to lease for ordinary or building or mining purposes.

6. A tenant for life may lease the settled land, or any part thereof, or any easement, right, or privilege of any kind, over or in relation to the same, for any purpose whatever, whether involving waste or not, for any term not exceeding—

(i.) In case of a building lease, ninety-nine years :

(ii.) In case of a mining lease, sixty years :

(iii.) In case of any other lease, twenty-one years.

Regulations respecting leases generally.

7.—(1.) Every lease shall be by deed, and be made to take effect in possession not later than twelve months after its date.

(2.) Every lease shall reserve the best rent that can reasonably be obtained, regard being had to any fine taken, and to any money laid out or to be laid out for the benefit of the settled land, and generally to the circumstances of the case.

(3.) Every lease shall contain a covenant by the lessee for payment of the rent, and a condition of re-entry on the rent not being paid within a time therein specified not exceeding thirty days.

(4.) A counterpart of every lease shall be executed by the lessee and delivered to the tenant for life; of which execution and delivery the execution of the lease by the tenant for life shall be sufficient evidence.

(5.) A statement, contained in a lease or in an indorsement thereon, signed by the tenant for life, respecting any matter of fact or of calculation under this Act in relation to the lease, shall, in favour of the lessee and of those claiming under him, be sufficient evidence of the matter stated.

Building and Mining Leases.

Regulations respecting building leases.

8.—(1.) Every building lease shall be made partly in consideration of the lessee, or some person by whose direction the lease is granted, or some other person, having erected, or agreeing to erect, buildings, new or additional, or having improved or repaired, or agreeing to improve or repair, buildings, or having executed, or agreeing to execute, on the land leased, an improvement authorized by this Act, for or in connexion with building purposes.

(2.) A peppercorn rent or a nominal or other rent less than the rent ultimately payable, may be made payable for the first five years or any less part of the term.

(3.) Where the land is contracted to be leased in lots, the entire

45 & 46 Vict. c. 38.

amount of rent to be ultimately payable may be apportioned among the lots in any manner; save that—

(i.) The annual rent reserved by any lease shall not be less than ten shillings; and

(ii.) The total amount of the rents reserved on all leases for the time being granted shall not be less than the total amount of the rents which, in order that the leases may be in conformity with this Act, ought to be reserved in respect of the whole land for the time being leased; and

(iii.) The rent reserved by any lease shall not exceed one fifth part of the full annual value of the land comprised in that lease with the buildings thereon when completed.

Regulations respecting mining leases.

9.—(1.) In a mining lease—

(i.) The rent may be made to be ascertainable by or to vary according to the acreage worked, or by or according to the quantities of any mineral or substance gotten, made merchantable, converted, carried away, or disposed of, in or from the settled land, or any other land, or by or according to any facilities given in that behalf; and

(ii.) A fixed or minimum rent may be made payable, with or without power for the lessee, in case the rent, according to acreage, or quantity, in any specified period does not produce an amount equal to the fixed or minimum rent, to make up the deficiency in any subsequent specified period, free of rent other than the fixed or minimum rent.

(2.) A lease may be made partly in consideration of the lessee having executed, or his agreeing to execute, on the land leased, an improvement authorized by this Act, for or in connexion with mining purposes.

Variation of building or mining lease according to circumstances of district.

10.—(1) Where it is shewn to the Court with respect to the district in which any settled land is situate, either—

(i.) That it is the custom for land therein to be leased or granted for building or mining purposes for a longer term or on other conditions than the term or conditions specified in that behalf in this Act, or in perpetuity; or

(ii.) That it is difficult to make leases or grants for building or mining purposes of land therein, except for a longer term or on other conditions than the term and conditions specified in that behalf in this Act, or except in perpetuity;

the Court may, if it thinks fit, authorize generally the tenant for life to make from time to time leases or grants of or affecting the settled land in that district, or parts thereof, for any term or in perpetuity, at fee-farm or other rents, secured by condition of re-entry, or otherwise, as in the order of the Court expressed, or may, if it thinks fit, authorize the tenant for life to make any such lease or grant in any particular case.

(2.) Thereupon the tenant for life, and, subject to any direction in the order of the Court to the contrary, each of his successors in title being a tenant for life, or having the powers of a tenant for life under this Act, may make in any case, or in the particular case, a lease or grant of or affecting the settled land, or part thereof, in conformity with the order.

Part of mining rent to be set aside.

11. Under a mining lease, whether the mines or minerals leased are already opened or in work or not, unless a contrary intention is expressed in the settlement, there shall be from time to time set aside, as capital money arising under this Act, part of the rent as follows, namely,—where the tenant for life is impeachable for waste in respect of minerals, three fourth parts of the rent, and otherwise one fourth part thereof, and in every such case the residue of the rent shall go as rents and profits.

Special Powers.

Leasing powers for special objects.

12. The leasing power of a tenant for life extends to the making of—

(i.) A lease for giving effect to a contract entered into by any of his predecessors in title for making a lease, which, if made by the predecessor, would have been binding on the successors in title; and

(ii.) A lease for giving effect to a covenant of renewal, performance whereof could be enforced against the owner for the time being of the settled land; and

(iii.) A lease for confirming, as far as may be, a previous lease, being void or voidable; but so that every lease, as and when confirmed, shall be such a lease as might at the date of the original lease have been lawfully granted, under this Act, or otherwise, as the case may require.

Surrenders.

Surrender and new grant of leases.

13.—(1.) A tenant for life may accept, with or without consideration, a surrender of any lease of settled land, whether made under this Act or not, in respect of the whole land leased, or any part thereof, with or without an exception of all or any of the mines and minerals therein, or in respect of mines and minerals, or any of them.

(2.) On a surrender of a lease in respect of part only of the land or mines and minerals leased, the rent may be apportioned.

(3.) On a surrender, the tenant for life may make of the land or mines and minerals surrendered, or of any part thereof, a new or other lease, or new or other leases in lots.

(4.) A new or other lease may comprise additional land or mines and minerals, and may reserve any apportioned or other rent.

45 & 46 Vict. c. 38.

(5.) On a surrender, and the making of a new or other lease, whether for the same or for any extended or other term, and whether or not subject to the same or to any other covenants, provisions, or conditions, the value of the lessee's interest in the lease surrendered may be taken into account in the determination of the amount of the rent to be reserved, and of any fine to be taken, and of the nature of the covenants, provisions, and conditions to be inserted in the new or other lease.

(6.) Every new or other lease shall be in conformity with this Act.

Copyholds.

Power to grant to copyholders licences for leasing.

14.—(1.) A tenant for life may grant to a tenant of copyhold or customary land, parcel of a manor comprised in the settlement, a licence to make any such lease of that land, or of a specified part thereof, as the tenant for life is by this Act empowered to make of freehold land.

(2.) The licence may fix the annual value whereon fines, fees, or other customary payments are to be assessed, or the amount of those fines, fees, or payments.

(3.) The licence shall be entered on the court rolls of the manor, of which entry a certificate in writing of the steward shall be sufficient evidence.

V.—Sales, Leases, and other Dispositions.

Mansion and Park.

Restriction as to mansion-house, park, &c.

15. Notwithstanding anything in this Act, the principal mansion-house on any settled land, and the demesnes thereof, and other lands usually occupied therewith, shall not be sold or leased by the tenant for life, without the consent of the trustees of the settlement, or an order of the Court.

Streets and Open Spaces.

Dedication for streets, open spaces, &c.

16. On or in connexion with a sale or grant for building purposes, or a building lease, the tenant for life, for the general benefit of the residents on the settled land, or on any part thereof,—

(i.) May cause or require any parts of the settled land to be appropriated and laid out for streets, roads, paths, squares, gardens, or other open spaces, for the use, gratuitously or on payment, of the public or of individuals, with sewers, drains, water-courses, fencing, paving, or other works necessary or proper in connexion therewith; and

(ii.) May provide that the parts so appropriated shall be conveyed to or vested in the trustees of the settlement, or other trustees,

or any company or public body, on trust or subject to provisions for securing the continued appropriation thereof to the purposes aforesaid, and the continued repair or maintenance of streets and other places and works aforesaid, with or without provision for appointment of new trustees when required; and

(iii.) May execute any general or other deed necessary or proper for giving effect to the provisions of this section (which deed may be inrolled in the Central Office of the Supreme Court of Judicature), and thereby declare the mode, terms, and conditions of the appropriation, and the manner in which and the persons by whom the benefit thereof is to be enjoyed, and the nature and extent of the privileges and conveniences granted.

Surface and Minerals Apart.

Separate dealing with surface and minerals, with or without wayleaves, &c.

17.—(1.) A sale, exchange, partition, or mining lease, may be made either of land, with or without an exception or reservation of all or any of the mines and minerals therein, or of any mines and minerals, and in any such case with or without a grant or reservation of powers of working, wayleaves or rights of way, rights of water and drainage, and other powers, easements, rights, and privileges for or incident to or connected with mining purposes, in relation to the settled land, or any part thereof, or any other land.

(2.) An exchange or partition may be made subject to and in consideration of the reservation of an undivided share in mines or minerals.

Mortgage.

Mortgage for equality money, &c.

18. Where money is required for enfranchisement, or for equality of exchange or partition, the tenant for life may raise the same on mortgage of the settled land, or of any part thereof, by conveyance of the fee simple, or other estate or interest the subject of the settlement, or by creation of a term of years in the settled land, or otherwise, and the money raised shall be capital money arising under this Act.

Undivided Share.

Concurrence in exercise of powers as to undivided share.

19. Where the settled land comprises an undivided share in land, or, under the settlement, the settled land has come to be held in undivided shares, the tenant for life of an undivided share may join or concur, in any manner and to any extent necessary or proper for any purpose of this Act, with any person entitled to or having power or right of disposition of or over another undivided share.

45 & 46 Vict. c. 38.

Conveyance.

Completion of sale, lease, &c., by conveyance.

20.—(1.) On a sale, exchange, partition, lease, mortgage, or charge, the tenant for life may, as regards land sold, given in exchange or on partition, leased, mortgaged, or charged, or intended so to be, including copyhold or customary or leasehold land vested in trustees, or as regards easements or other rights or privileges sold or leased, or intended so to be, convey or create the same by deed, for the estate or interest the subject of the settlement, or for any less estate or interest, to the uses and in the manner requisite for giving effect to the sale, exchange, partition, lease, mortgage, or charge.

(2.) Such a deed, to the extent and in the manner to and in which it is expressed or intended to operate and can operate under this Act, is effectual to pass the land conveyed, or the easements, rights, or privileges created, discharged from all the limitations, powers, and provisions of the settlement, and from all estates, interests, and charges subsisting or to arise thereunder, but subject to and with the exception of—

(i.) All estates, interests, and charges having priority to the settlement; and

(ii.) All such other, if any, estates, interests, and charges as have been conveyed or created for securing money actually raised at the date of the deed; and

(iii.) All leases and grants at fee-farm rents or otherwise, and all grants of easements, rights of common, or other rights or privileges granted or made for value in money or money's worth, or agreed so to be, before the date of the deed, by the tenant for life, or by any of his predecessors in title, or by any trustees for him or them, under the settlement, or under any statutory power, or being otherwise binding on the successors in title of the tenant for life.

(3.) In case of a deed relating to copyhold or customary land, it is sufficient that the deed be entered on the court rolls of the manor, and the steward is hereby required on production to him of the deed to make the proper entry; and on that production, and on payment of customary fines, fees, and other dues or payments, any person whose title under the deed requires to be perfected by admittance shall be admitted accordingly; but if the steward so requires, there shall also be produced to him so much of the settlement as may be necessary to show the title of the person executing the deed; and the same may, if the steward thinks fit, be also entered on the court rolls.

VI.—Investment or other Application of Capital Trust Money.

Capital money under Act;

21. Capital money arising under this Act, subject to payment of

investment, &c., by trustees or Court.

claims properly payable thereout, and to application thereof for any special authorized object for which the same was raised, shall, when received, be invested or otherwise applied wholly in one, or partly in one and partly in another or others, of the following modes (namely):

(i.) In investment on Government securities, or on other securities on which the trustees of the settlement are by the settlement or by law authorized to invest trust money of the settlement, or on the security of the bonds, mortgages, or debentures, or in the purchase of the debenture stock, of any railway company in Great Britain or Ireland incorporated by special Act of Parliament, and having for ten years next before the date of investment paid a dividend on its ordinary stock or shares, with power to vary the investment into or for any other such securities:

See Rules, *post*.

(ii.) In discharge, purchase, or redemption of incumbrances affecting the inheritance of the settled land, or other the whole estate the subject of the settlement, or of land-tax, rentcharge in lieu of tithe, Crown rent, chief rent, or quit rent, charged on or payable out of the settled land:

(iii.) In payment for any improvement authorized by this Act:

(iv.) In payment for equality of exchange or partition of settled land:

(v.) In purchase of the seignory of any part of the settled land, being freehold land, or in purchase of the fee simple of any part of the settled land, being copyhold or customary land:

(vi.) In purchase of the reversion or freehold in fee of any part of the settled land, being leasehold land held for years, or life, or years determinable on life:

(vii.) In purchase of land in fee simple, or of copyhold or customary land, or of leasehold land held for sixty years or more unexpired at the time of purchase, subject or not to any exception or reservation of or in respect of mines or minerals therein, or of or in respect of rights or powers relative to the working of mines or minerals therein, or in other land:

(viii.) In purchase, either in fee simple, or for a term of sixty years or more, of mines and minerals convenient to be held or worked with the settled land, or of any easement, right, or privilege convenient to be held with the settled land for mining or other purposes:

(ix.) In payment to any person becoming absolutely entitled or empowered to give an absolute discharge:

(x.) In payment of costs, charges, and expenses of or incidental to the exercise of any of the powers, or the execution of any of the provisions, of this Act:

45 & 46 Vict. c. 38.

(xi.) In any other mode in which money produced by the exercise of a power of sale in the settlement is applicable thereunder.

Regulations respecting investment, devolution, and income of securities, &c.

22.—(1.) Capital money arising under this Act shall, in order to its being invested or applied as aforesaid, be paid either to the trustees of the settlement or into Court, at the option of the tenant for life, and shall be invested or applied by the trustees, or under the direction of the Court, as the case may be, accordingly.

(2.) The investment or other application by the trustees shall be made according to the direction of the tenant for life, and in default thereof, according to the discretion of the trustees, but in the last-mentioned case subject to any consent required or direction given by the settlement with respect to the investment or other application by the trustees of trust money of the settlement; and any investment shall be in the names or under the control of the trustees.

(3.) The investment or other application under the direction of the Court shall be made on the application of the tenant for life, or of the trustees.

(4.) Any investment or other application shall not during the life of the tenant for life be altered without his consent.

(5.) Capital money arising under this Act while remaining uninvested or unapplied, and securities on which an investment of any such capital money is made, shall, for all purposes of disposition, transmission, and devolution, be considered as land, and the same shall be held for and go to the same persons successively, in the same manner and for and on the same estates, interests, and trusts, as the land wherefrom the money arises would, if not disposed of, have been held and have gone under the settlement.

(6.) The income of those securities shall be paid or applied as the income of that land, if not disposed of, would have been payable or applicable under the settlement.

(7.) Those securities may be converted into money, which shall be capital money arising under this Act.

Investment in land in England.

23. Capital money arising under this Act from settled land in England shall not be applied in the purchase of land out of England, unless the settlement expressly authorizes the same.

Settlement of land purchased, taken in exchange, &c.

24.—(1.) Land acquired by purchase or in exchange, or on partition, shall be made subject to the settlement in manner directed in this section.

(2.) Freehold land shall be conveyed to the uses, on the trusts, and subject to the powers and provisions which, under the settlement, or by reason of the exercise of any power of charging therein contained, are subsisting with respect to the settled land, or as near thereto as circumstances permit, but not so as to increase or multiply charges or powers of charging.

(3.) Copyhold, customary, or leasehold land shall be conveyed to and

vested in the trustees of the settlement on trusts and subject to powers and provisions corresponding, as nearly as the law and circumstances permit, with the uses, trusts, powers, and provisions to on and subject to which freehold land is to be conveyed as aforesaid; so nevertheless that the beneficial interest in land held by lease for years shall not vest absolutely in a person who is by the settlement made by purchase tenant in tail, or in tail male, or in tail female, and who dies under the age of twenty-one years, but shall, on the death of that person under that age, go as freehold land conveyed as aforesaid would go.

(4.) Land acquired as aforesaid may be made a substituted security for any charge in respect of money actually raised, and remaining unpaid, from which the settled land, or any part thereof, or any undivided share therein, has theretofore been released on the occasion and in order to the completion of a sale, exchange, or partition.

(5.) Where a charge does not affect the whole of the settled land, then the land acquired shall not be subjected thereto, unless the land is acquired either by purchase with money arising from sale of land which was before the sale subject to the charge, or by an exchange or partition of land which, or an undivided share wherein, was before the exchange or partition subject to the charge.

(6.) On land being so acquired, any person who, by the direction of the tenant for life, so conveys the land as to subject it to any charge, is not concerned to inquire whether or not it is proper that the land should be subjected to the charge.

(7.) The provisions of this section referring to land extend and apply, as far as may be, to mines and minerals, and to easements, rights and privileges over and in relation to land.

VII.—Improvements.

Improvements with Capital Trust Money.

Description of improvements authorized by Act.

25. Improvements authorized by this Act are the making or execution on, or in connexion with, and for the benefit of settled land, of any of the following works, or of any works for any of the following purposes, and any operation incident to or necessary or proper in the execution of any of those works, or necessary or proper for carrying into effect any of those purposes, or for securing the full benefit of any of those works or purposes (namely):

(i.) Drainage, including the straightening, widening, or deepening of drains, streams, and watercourses:

(ii.) Irrigation; warping:

(iii.) Drains, pipes, and machinery for supply and distribution of sewage as manure;

45 & 46 Vict. c. 38.

(iv.) Embanking or weiring from a river or lake, or from the sea, or a tidal water:

(v.) Groynes; sea walls; defences against water:

(vi.) Inclosing; straightening of fences; re-division of fields:

(vii.) Reclamation; dry warping:

(viii.) Farm roads; private roads; roads or streets in villages or towns:

(ix.) Clearing; trenching; planting:

(x.) Cottages for labourers, farm servants, and artizans, employed on the settled land or not:

(xi.) Farm-houses, offices, and out-buildings, and other buildings for farm purposes:

(xii.) Saw-mills, scutch-mills, and other mills, water-wheels, engine-houses, and kilns, which will increase the value of the settled land for agricultural purposes or as woodland or otherwise:

(xiii.) Reservoirs, tanks, conduits, watercourses, pipes, wells, ponds, shafts, dams, weirs, sluices, and other works and machinery for supply and distribution of water for agricultural, manufacturing, or other purposes, or for domestic or other consumption:

(xiv.) Tramways; railways; canals; docks:

(xv.) Jetties, piers, and landing places on rivers, lakes, the sea, or tidal waters, for facilitating transport of persons and of agricultural stock and produce, and of manure and other things required for agricultural purposes, and of minerals, and of things required for mining purposes:

(xvi.) Markets and market-places:

(xvii.) Streets, roads, paths, squares, gardens, or other open spaces for the use, gratuitously or on payment, of the public or of individuals, or for dedication to the public, the same being necessary or proper in connexion with the conversion of land into building land:

(xviii.) Sewers, drains, watercourses, pipe-making, fencing, paving, brick-making, tile-making, and other works necessary or proper in connexion with any of the objects aforesaid:

(xix.) Trial pits for mines, and other preliminary works necessary or proper in connexion with development of mines:

(xx.) Reconstruction, enlargement, or improvement of any of those works.

Approval by Land Commissioners of scheme for improvement and payment thereon.

26.—(1.) Where the tenant for life is desirous that capital money arising under this Act shall be applied in or towards payment for an improvement authorized by this Act, he may submit for approval to the trustees of the settlement, or to the Court, as the case may require, a scheme for the execution of the improvement, showing the proposed expenditure thereon.

(2.) Where the capital money to be expended is in the hands of trustees, then, after a scheme is approved by them, the trustees may apply that money in or towards payment for the whole or part of any work or operation comprised in the improvement, on—

(i.) A certificate of the Land Commissioners certifying that the work or operation, or some specified part thereof, has been properly executed, and what amount is properly payable by the trustees in respect thereof, which certificate shall be conclusive in favour of the trustees as an authority and discharge for any payment made by them in pursuance thereof; or on

(ii.) A like certificate of a competent engineer or able practical surveyor nominated by the trustees and approved by the Commissioners, or by the Court, which certificate shall be conclusive as aforesaid; or on

(iii.) An order of the Court directing or authorizing the trustees to so apply a specified portion of the capital money.

(3.) Where the capital money to be expended is in Court, then, after a scheme is approved by the Court, the Court may, if it thinks fit, on a report or certificate of the Commissioners, or of a competent engineer or able practical surveyor, approved by the Court, or on such other evidence as the Court thinks sufficient, make such order and give such directions as it thinks fit for the application of that money, or any part thereof, in or towards payment for the whole or part of any work or operation comprised in the improvement.

Concurrence in improvements.

27. The tenant for life may join or concur with any other person interested in executing any improvement authorized by this Act, or in contributing to the cost thereof.

Obligation on tenant for life and successors to maintain, insure, &c.

28.—(1.) The tenant for life, and each of his successors in title having, under the settlement, a limited estate or interest only in the settled land, shall, during such period, if any, as the Land Commissioners by certificate in any case prescribe, maintain and repair, at his own expense, every improvement executed under the foregoing provisions of this Act, and where a building or work in its nature insurable against damage by fire is comprised in the improvement, shall insure and keep insured the same, at his own expense, in such amount, if any, as the Commissioners by certificate in any case prescribe.

(2.) The tenant for life, or any of his successors as aforesaid, shall not cut down or knowingly permit to be cut down, except in proper thinning, any trees planted as an improvement under the foregoing provisions of this Act.

(3.) The tenant for life, and each of his successors as aforesaid, shall from time to time, if required by the Commissioners, on or without the suggestion of any person having, under the settlement, any estate or interest in the settled land in possession, remainder, or otherwise, report to the Commissioners the state of every improvement

45 & 46 Vict. c. 38.

executed under this Act, and the fact and particulars of fire insurance, if any.

(4.) The Commissioners may vary any certificate made by them under this section, in such manner or to such extent as circumstances appear to them to require, but not so as to increase the liabilities of the tenant for life, or any of his successors as aforesaid.

(5.) If the tenant for life, or any of his successors as aforesaid, fails in any respect to comply with the requisitions of this section, or does any act in contravention thereof, any person having, under the settlement, any estate or interest in the settled land in possession, remainder, or reversion, shall have a right of action, in respect of that default or act, against the tenant for life; and the estate of the tenant for life, after his death, shall be liable to make good to the persons entitled under the settlement any damages occasioned by that default or act.

Execution and Repair of Improvements.

Protection as regards waste in execution and repair of improvements.

29. The tenant for life, and each of his successors in title having, under the settlement, a limited estate or interest only in the settled land, and all persons employed by or under contract with the tenant for life, or any such successor, may from time to time enter on the settled land, and, without impeachment of waste by any remainderman or reversioner, thereon execute any improvement authorized by this Act, or inspect, maintain, and repair the same, and, for the purposes thereof, on the settled land, do, make, and use all acts, works, and conveniences proper for the execution, maintenance, repair, and use thereof, and get and work freestone, limestone, clay, sand, and other substances, and make tramways and other ways, and burn and make bricks, tiles, and other things, and cut down and use timber and other trees not planted or left standing for shelter or ornament.

Improvement of Land Act, 1864.

Extension of 27 & 28 Vict. c. 114, s. 9.

30. The enumeration of improvements contained in section nine of the Improvement of Land Act, 1864, is hereby extended so as to comprise, subject and according to the provisions of that Act, but only as regards applications made to the Land Commissioners after the commencement of this Act, all improvements authorized by this Act.

VIII.—CONTRACTS.

Power for tenant for life to enter into contracts.

31.—(1.) A tenant for life—

(i.) May contract to make any sale, exchange, partition, mortgage, or charge; and

(ii.) May vary or rescind, with or without consideration, the contract, in the like cases and manner in which, if he were absolute owner of the settled land, he might lawfully vary or rescind the same, but so that the contract as varied be in conformity with this Act; and any such consideration, if paid in money, shall be capital money arising under this Act; and

(iii.) May contract to make any lease; and in making the lease may vary the terms, with or without consideration, but so that the lease be in conformity with this Act; and

(iv.) May accept a surrender of a contract for a lease, in like manner and on the like terms in and on which he might accept a surrender of a lease; and thereupon may make a new or other contract, or new or other contracts, for or relative to a lease or leases, in like manner and on the like terms in and on which he might make a new or other lease, or new or other leases, where a lease had been granted; and

(v.) May enter into a contract for or relating to the execution of any improvement authorized by this Act, and may vary or rescind the same; and

(vi.) May, in any other case, enter into a contract to do any act for carrying into effect any of the purposes of this Act, and may vary or rescind the same.

(2.) Every contract shall be binding on and shall enure for the benefit of the settled land, and shall be enforceable against and by every successor in title for the time being of the tenant for life, and may be carried into effect by any such successor; but so that it may be varied or rescinded by any such successor, in the like case and manner, if any, as if it had been made by himself.

(3.) The Court may, on the application of the tenant for life, or of any such successor, or of any person interested in any contract, give directions respecting the enforcing, carrying into effect, varying, or rescinding thereof.

(4.) Any preliminary contract under this Act for or relating to a lease shall not form part of the title or evidence of the title of any person to the lease, or to the benefit thereof.

IX.—Miscellaneous Provisions.

Application of money in Court under Lands Clauses and other Acts. 8 & 9 Vict. c. 18. 23 & 24 Vict. c. 106. 32 & 33 Vict. c. 18.

32. Where, under an Act incorporating or applying, wholly or in part, the Lands Clauses Consolidation Acts, 1845, 1860, and 1869, or under the Settled Estates Act, 1877, or under any other Act, public, local, personal, or private, money is at the commencement of this Act in Court, or is afterwards paid into Court, and is liable to be laid out in the purchase of land to be made subject to a settlement, then, in addition to any mode of dealing therewith authorized by the Act

45 & 46 Vict. c. 38.

40 & 41 Vict. c. 18.

under which the money is in Court, that money may be invested or applied as capital money arising under this Act, on the like terms, if any, respecting costs and other things, as nearly as circumstances admit, and (notwithstanding anything in this Act) according to the same procedure, as if the modes of investment or application authorized by this Act were authorized by the Act under which the money is in Court.

Application of money in hands of trustees under powers of settlement.

33. Where under a settlement, money is in the hands of trustees, and is liable to be laid out in the purchase of land to be made subject to the settlement, then, in addition to such powers of dealing therewith as the trustees have independently of this Act, they may, at the option of the tenant for life, invest or apply the same as capital money arising under this Act.

Application of money paid for lease or reversion.

34. Where capital money arising under this Act is purchase money paid in respect of a lease for years, or life, or years determinable on life, or in respect of any other estate or interest in land less than the fee simple, or in respect of a reversion dependent on any such lease, estate, or interest, the trustees of the settlement or the Court, as the case may be, and in the case of the Court on the application of any party interested in that money, may, notwithstanding anything in this Act, require and cause the same to be laid out, invested, accumulated, and paid in such manner as, in the judgment of the trustees or of the Court, as the case may be, will give to the parties interested in that money the like benefit therefrom as they might lawfully have had from the lease, estate, interest, or reversion in respect whereof the money was paid, or as near thereto as may be.

Cutting and sale of timber, and part of proceeds to be set aside.

35.—(1.) Where a tenant for life is impeachable for waste in respect of timber, and there is on the settled land timber ripe and fit for cutting, the tenant for life, on obtaining the consent of the trustees of the settlement or an order of the Court, may cut and sell that timber, or any part thereof.

(2.) Three fourth parts of the net proceeds of the sale shall be set aside as and be capital money arising under this Act, and the other fourth part shall go as rents and profits.

Proceedings for protection or recovery of land settled or claimed as settled.

36. The Court may, if it thinks fit, approve of any action, defence, petition to Parliament, parliamentary opposition, or other proceeding taken or proposed to be taken for protection of settled land, or of any action or proceeding taken or proposed to be taken for recovery of land being or alleged to be subject to a settlement, and may direct that any costs, charges, or expenses incurred or to be incurred in relation thereto, or any part thereof, be paid out of property subject to the settlement.

Heirlooms.

37.—(1.) Where personal chattels are settled on trust so as to devolve with land until a tenant in tail by purchase is born or attains the age of twenty-one years, or so as otherwise to vest in some person becoming

entitled to an estate of freehold of inheritance in the land a tenant for life of the land may sell the chattels or any of them.

(2.) The money arising by the sale shall be capital money arising under this Act, and shall be paid, invested, or applied and otherwise dealt with in like manner in all respects as by this Act directed with respect to other capital money arising under this Act, or may be invested in the purchase of other chattels, of the same or any other nature, which, when purchased, shall be settled and held on the same trusts, and shall devolve in the same manner as the chattels sold.

(3.) A sale or purchase of chattels under this section shall not be made without an order of the Court.

X.—Trustees.

Appointment of trustees by Court.

38.—(1.) If at any time there are no trustees of a settlement within the definition in this Act, or where in any other case it is expedient, for purposes of this Act, that new trustees of a settlement be appointed, the Court may, if it thinks fit, on the application of the tenant for life or of any other person having, under the settlement, an estate or interest in the settled land, in possession, remainder, or otherwise, or, in the case of an infant, of his testamentary or other guardian, or next friend, appoint fit persons to be trustees under the settlement for purposes of this Act.

(2.) The persons so appointed, and the survivors and survivor of them, while continuing to be trustees or trustee, and, until the appointment of new trustees, the personal representatives or representative for the time being of the last surviving or continuing trustee, shall for purposes of this Act become and be the trustees or trustee of the settlement.

Number of trustees to act.

39.—(1.) Notwithstanding anything in this Act, capital money arising under this Act shall not be paid to fewer than two persons as trustees of a settlement, unless the settlement authorizes the receipt of capital trust money of the settlement by one trustee.

(2.) Subject thereto, the provisions of this Act referring to the trustees of a settlement apply to the surviving or continuing trustees or trustee of the settlement for the time being.

Trustees' receipts.

40. The receipt in writing of the trustees of a settlement, or where one trustee is empowered to act, of one trustee, or of the personal representatives or representative of the last surviving or continuing trustee, for any money or securities, paid or transferred to the trustees, trustee, representatives, or representative, as the case may be, effectually discharges the payer or transferor therefrom, and from being bound to see to the application or being answerable for any loss or misapplication thereof, and, in case of a mortgagee or other person advancing money, from being concerned to see that any money advanced by him is wanted for any purpose of this Act, or that no more than is wanted is raised.

45 & 46 Vict. c. 38.

Protection of each trustee individually.

41. Each person who is for the time being trustee of a settlement is answerable for what he actually receives only, notwithstanding his signing any receipt for conformity, and in respect of his own acts, receipts, and defaults only, and is not answerable in respect of those of any other trustee, or of any banker, broker, or other person, or for the insufficiency or deficiency of any securities, or for any loss not happening through his own wilful default.

Protection of trustees generally.

42. The trustees of a settlement, or any of them, are not liable for giving any consent, or for not making, bringing, taking, or doing any such application, action, proceeding, or thing, as they might make, bring, take, or do; and in case of purchase of land with capital money arising under this Act, or of an exchange, partition, or lease, are not liable for adopting any contract made by the tenant for life, or bound to inquire as to the propriety of the purchase, exchange, partition, or lease, or answerable as regards any price, consideration, or fine, and are not liable to see to or answerable for the investigation of the title, or answerable for a conveyance of land, if the conveyance purports to convey the land in the proper mode, or liable in respect of purchase-money paid by them by direction of the tenant for life to any person joining in the conveyance as a conveying party, or as giving a receipt for the purchase-money, or in any other character, or in respect of any other money paid by them by direction of the tenant for life on the purchase, exchange, partition, or lease.

Trustees reimbursement.

43. The trustees of a settlement may reimburse themselves or pay and discharge out of the trust property all expenses properly incurred by them.

Reference of differences to Court.

44. If at any time a difference arises between a tenant for life and the trustees of the settlement, respecting the exercise of any of the powers of this Act, or respecting any matter relating thereto, the Court may, on the application of either party, give such directions respecting the matter in difference, and respecting the costs of the application, as the Court thinks fit.

Notice to trustees.

45.—(1.) A tenant for life, when intending to make a sale, exchange, partition, lease, mortgage, or charge, shall give notice of his intention in that behalf to each of the trustees of the settlement, by posting registered letters, containing the notice, addressed to the trustees, severally, each at his usual or last known place of abode in the United Kingdom, and shall give like notice to the solicitor for the trustees, if any such solicitor is known to the tenant for life, by posting a registered letter, containing the notice, addressed to the solicitor at his place of business in the United Kingdom, every letter under this section being posted not less than one month before the making by the tenant for life of the sale, exchange, partition, lease, mortgage, or charge, or of a contract for the same.

(2.) Provided that at the date of notice given the number of trustees

shall not be less than two, unless a contrary intention is expressed in the settlement. 45 & 46 Vict. c. 38.

(3.) A person dealing in good faith with the tenant for life is not concerned to inquire respecting the giving of any such notice as is required by this section.

XI.—Court; Land Commissioners; Procedure.

Regulations respecting payments into Court, applications, &c.

46.—(1.) All matters within the jurisdiction of the Court under this Act shall, subject to the Acts regulating the Court, be assigned to the Chancery Division of the Court.

(2.) Payment of money into Court effectually exonerates therefrom the person making the payment.

(3.) Every application to the Court shall be by petition, or by summons at Chambers.

(4.) On an application by the trustees of a settlement notice shall be served in the first instance on the tenant for life.

(5.) On any application notice shall be served on such persons, if any, as the Court thinks fit.

(6.) The Court shall have full power and discretion to make such order as it thinks fit respecting the costs, charges, or expenses of all or any of the parties to any application, and may, if it thinks fit, order that all or any of those costs, charges, or expenses be paid out of property subject to the settlement.

(7.) General Rules for purposes of this Act shall be deemed Rules of Court within section seventeen of the Appellate Jurisdiction Act, 1876, as altered by section nineteen of the Supreme Court of Judicature Act, 1881, and may be made accordingly. 39 & 40 Vict. c. 59. 44 & 45 Vict. c. 68.

(8.) The powers of the Court may, as regards land in the County Palatine of Lancaster, be exercised also by the Court of Chancery of the County Palatine; and Rules for regulating proceedings in that Court shall be from time to time made by the Chancellor of the Duchy of Lancaster, with the advice and consent of a Judge of the High Court acting in the Chancery Division, and of the Vice-Chancellor of the County Palatine.

(9.) General Rules, and Rules for the Court of Chancery of the County Palatine, may be made at any time after the passing of this Act, to take effect on or after the commencement of this Act.

(10.) The powers of the Court may, as regards land not exceeding in capital value five hundred pounds, or in annual rateable value thirty pounds, and, as regards capital money arising under this Act, and securities in which the same is invested, not exceeding in amount or value five hundred pounds, and as regards personal chattels settled or to be settled, as in this Act mentioned, not exceeding in value five hundred pounds, be exercised by any County Court within the district whereof is

45 & 46 Vict. c. 38.

situate any part of the land which is to be dealt with in the Court, or from which the capital money to be dealt with in the Court arises under this Act, or in connection with which the personal chattels to be dealt with in the Court are settled.

Payment of costs out of settled property.

47. Where the Court directs that any costs, charges, or expenses be paid out of property subject to a settlement, the same shall, subject and according to the directions of the Court, be raised and paid out of capital money arising under this Act, or other money liable to be laid out in the purchase of land, to be made subject to the settlement, or out of investments representing such money, or out of income of any such money or investments, or out of any accumulations of income of land, money, or investments, or by means of a sale of part of the settled land in respect whereof the costs, charges, or expenses are incurred, or of other settled land comprised in the same settlement and subject to the same limitations, or by means of a mortgage of the settled land or any part thereof, to be made by such person as the Court directs, and either by conveyance of the fee simple or other estate or interest the subject of the settlement, or by creation of a term, or otherwise, or by means of a charge on the settled land or any part thereof, or partly in one of those modes and partly in another or others, or in any such other mode as the Court thinks fit.

Constitution of Land Commissioners; their powers, &c.

48.—(1.) The commissioners now bearing the three several styles of the Inclosure Commissioners for England and Wales, and the Copyhold Commissioners, and the Tithe Commissioners for England and Wales, shall, by virtue of this Act, become and shall be styled the Land Commissioners for England.

(2.) The Land Commissioners shall cause one seal to be made with their style as given by this Act; and in the execution and discharge of any power or duty under any Act relating to the three several bodies of commissioners aforesaid, they shall adopt and use the seal and style of the Land Commissioners for England, and no other.

(3.) Nothing in the foregoing provisions of this section shall be construed as altering in any respect the powers, authorities, or duties of the Land Commissioners, or as affecting in respect of appointment, salary, pension, or otherwise any of those commissioners, in office at the passing of this Act, or any assistant commissioner, secretary, or other officer or person then in office or employed under them.

(4.) All Acts of Parliament, judgments, decrees, or orders of any court, awards, deeds, and other documents, passed or made before the commencement of this Act, shall be read and have effect as if the Land Commissioners were therein mentioned instead of one or more of the three several bodies of commissioners aforesaid.

(5.) All acts, matters, and things commenced by or under the authority of any one or more of the three several bodies of commissioners aforesaid before the commencement of this Act, and not then

completed, shall and may be carried on and completed by or under the authority of the Land Commissioners; and the Land Commissioners, for the purpose of prosecuting, or defending, and carrying on any action, suit, or proceeding pending at the commencement of this Act, shall come into the place of any one or more, as the case may require, of the three several bodies of commissioners aforesaid. 45 & 46 Vict. c. 38.

(6.) The Land Commissioners shall, by virtue of this Act, have, for the purposes of any Act, public, local, personal, or private, passed or to be passed, making provision for the execution of improvements on settled land, all such powers and authorities as they have for the purposes of the Improvement of Land Act, 1864; and the provisions of the last-mentioned Act relating to their proceedings and inquiries, and to authentication of instruments, and to declarations, statements, notices, applications, forms, security for expenses, inspections, and examinations, shall extend and apply, as far as the nature and circumstances of the case admit, to acts and proceedings done or taken by or in relation to the Land Commissioners under any Act making provision as last aforesaid; and the provisions of any Act relating to fees or to security for costs to be taken in respect of the business transacted under the Acts administered by the three several bodies of commissioners aforesaid shall extend and apply to the business transacted by or under the direction of the Land Commissioners under any Act, public, local, personal, or private, passed or to be passed, by which any power or duty is conferred or imposed on them. 27 & 28 Vict. c. 114.

Filing of certificates, &c., of Commissioners.

49.—(1.) Every certificate and report approved and made by the Land Commissioners under this Act shall be filed in their office.

(2.) An office copy of any certificate or report so filed shall be delivered out of their office to any person requiring the same, on payment of the proper fee, and shall be sufficient evidence of the certificate or report whereof it purports to be a copy.

XII.—Restrictions, Savings, and General Provisions.

Powers not assignable; contract not to exercise powers void.

50.—(1.) The powers under this Act of a tenant for life are not capable of assignment or release, and do not pass to a person as being, by operation of law or otherwise, an assignee of a tenant for life, and remain exerciseable by the tenant for life after and notwithstanding any assignment, by operation of law or otherwise, of his estate or interest under the settlement.

(2.) A contract by a tenant for life not to exercise any of his powers under this Act is void.

(3.) But this section shall operate without prejudice to the rights of any person being an assignee for value of the estate or interest of the tenant for life; and in that case the assignee's rights shall not be affected without his consent, except that, unless the assignee is actually

45 & 46 Vict. c. 38.

in possession of the settled land or part thereof, his consent shall not be requisite for the making of leases thereof by the tenant for life, provided the leases are made at the best rent that can reasonably be obtained, without fine, and in other respects are in conformity with this Act.

(4.) This section extends to assignments made or coming into operation before or after and to acts done before or after the commencement of this Act; and in this section assignment includes assignment by way of mortgage, and any partial or qualified assignment, and any charge or incumbrance; and assignee has a meaning corresponding with that of assignment.

Prohibition or limitation against exercise of powers, void.

51.—(1.) If in a settlement, will, assurance, or other instrument executed or made before or after, or partly before and partly after, the commencement of this Act a provision is inserted purporting or attempting, by way of direction, declaration, or otherwise, to forbid a tenant for life to exercise any power under this Act, or attempting, or tending, or intended, by a limitation, gift, or disposition over of settled land, or by a limitation, gift, or disposition of other real or any personal property, or by the imposition of any condition, or by forfeiture, or in any other manner whatever, to prohibit or prevent him from exercising, or to induce him to abstain from exercising, or to put him into a position inconsistent with his exercising, any power under this Act, that provision as far as it purports, or attempts, or tends, or is intended to have, or would or might have, the operation aforesaid, shall be deemed to be void.

(2.) For the purposes of this section an estate or interest limited to continue so long only as a person abstains from exercising any power shall be and take effect as an estate or interest to continue for the period for which it would continue if that person were to abstain from exercising the power, discharged from liability to determination or cesser by or on his exercising the same.

Provisions against forfeiture.

52. Notwithstanding anything in a settlement, the exercise by the tenant for life of any power under this Act shall not occasion a forfeiture.

Tenant for life trustee for all parties interested.

53. A tenant for life shall, in exercising any power under this Act, have regard to the interests of all parties entitled under the settlement, and shall, in relation to the exercise thereof by him, be deemed to be in the position and to have the duties and liabilities of a trustee for those parties.

General protection of purchasers, &c.

54. On a sale, exchange, partition, lease, mortgage, or charge, a purchaser, lessee, mortgagee, or other person dealing in good faith with a tenant for life shall, as against all parties entitled under the settlement, be conclusively taken to have given the best price, consideration, or rent, as the case may require, that could reasonably be obtained by the tenant for life, and to have complied with all the requisitions of this Act.

55.—(1.) Powers and authorities conferred by this Act on a tenant for life or trustees or the Court or the Land Commissioners are exerciseable from time to time.

Exercise of powers; limitation of provisions, &c.

(2.) Where a power of sale, enfranchisement, exchange, partition, leasing, mortgaging, charging, or other power, is exercised by a tenant for life, or by the trustees of a settlement, he and they may respectively execute, make, and do all deeds, instruments, and things necessary or proper in that behalf.

(3.) Where any provision in this Act refers to sale, purchase, exchange, partition, leasing, or other dealing, or to any power, consent, payment, receipt, deed, assurance, contract, expenses, act, or transaction, the same shall be construed to extend only (unless it is otherwise expressed) to sales, purchases, exchanges, partitions, leasings, dealings, powers, consents, payments, receipts, deeds, assurances, contracts, expenses, acts, and transactions under this Act.

Saving for other powers.

56.—(1.) Nothing in this Act shall take away, abridge, or prejudicially affect any power for the time being subsisting under a settlement, or by statute or otherwise, exerciseable by a tenant for life, or by trustees with his consent, or on his request, or by his direction, or otherwise; and the powers given by this Act are cumulative.

(2.) But, in case of conflict between the provisions of a settlement and the provisions of this Act, relative to any matter in respect whereof the tenant for life exercises or contracts or intends to exercise any power under this Act, the provisions of this Act shall prevail; and, accordingly, notwithstanding anything in the settlement, the consent of the tenant for life shall, by virtue of this Act, be necessary to the exercise by the trustees of the settlement or other person of any power conferred by the settlement exerciseable for any purpose provided for in this Act.

(3.) If a question arises, or a doubt is entertained, respecting any matter within this section, the Court may, on the application of the trustees of the settlement, or of the tenant for life, or of any other person interested, give its decision, opinion, advice, or direction thereon.

Additional or larger powers by settlement.

57.—(1.) Nothing in this Act shall preclude a settlor from conferring on the tenant for life, or the trustees of the settlement, any powers additional to or larger than those conferred by this Act.

(2.) Any additional or larger powers so conferred shall, as far as may be, notwithstanding anything in this Act, operate and be exerciseable in the like manner, and with all the like incidents, effects, and consequences, as if they were conferred by this Act, unless a contrary intention is expressed in the settlement.

XIII.—Limited Owners generally.

Enumeration of other limited owners,

58.—(1.) Each person as follows shall, when the estate or interest of each of them is in possession, have the powers of a tenant for life under

45 & 46 Vict. c. 38.

to have powers of tenant for life.

this Act, as if each of them were a tenant for life as defined in this Act (namely):

(i.) A tenant in tail, including a tenant in tail who is by Act of Parliament restrained from barring or defeating his estate tail, and although the reversion is in the Crown, and so that the exercise by him of his powers under this Act shall bind the Crown, but not including such a tenant in tail where the land in respect whereof he is so restrained was purchased with money provided by Parliament in consideration of public services:

(ii.) A tenant in fee simple, with an executory limitation, gift, or disposition over, on failure of his issue, or in any other event:

(See *In re Morgan*, L. R. 24 Ch. D. 114.)

(iii.) A person entitled to a base fee, although the reversion is in the Crown, and so that the exercise by him of his powers under this Act shall bind the Crown:

(iv.) A tenant for years determinable on life, not holding merely under a lease at a rent:

(This does not include interest in a term of years to determine with life of legatee; *In re Hazle's Settled Estates*, L. R. 26 Ch. D. 428; 29 Ch. D. 78.)

(v.) A tenant for the life of another, not holding merely under a lease at a rent:

(vi.) A tenant for his own or any other life, or for years determinable on life, whose estate is liable to cease in any event during that life, whether by expiration of the estate, or by conditional limitation, or otherwise, or to be defeated by an executory limitation, gift, or disposition over, or is subject to a trust for accumulation of income for payment of debts or other purpose:

(vii.) A tenant in tail after possibility of issue extinct:

(viii.) A tenant by the curtesy:

(ix.) A person entitled to the income of land under a trust or direction for payment thereof to him during his own or any other life, whether subject to expenses of management or not, or until sale of the land, or until forfeiture of his interest therein on bankruptcy or other event.

(2.) In every such case, the provisions of this Act referring to a tenant for life, either as conferring powers on him or otherwise, and to a settlement, and to settled land, shall extend to each of the persons aforesaid, and to the instrument under which his estate or interest arises, and to the land therein comprised.

(3.) In any such case any reference in this Act to death as regards a tenant for life shall, where necessary, be deemed to refer to the determination by death or otherwise of such estate or interest as last aforesaid.

45 & 46 Vict. c. 38.

XIV.—Infants; Married Women; Lunatics.

59. Where a person, who is in his own right seised of or entitled in possession to land, is an infant, then for purposes of this Act the land is settled land, and the infant shall be deemed tenant for life thereof.

Infant absolutely entitled to be as tenant for life.

60. Where a tenant for life, or a person having the powers of a tenant for life under this Act, is an infant, or an infant would, if he were of full age, be a tenant for life, or have the powers of a tenant for life under this Act, the powers of a tenant for life under this Act may be exercised on his behalf by the trustees of the settlement, and if there are none, then by such person and in such manner as the Court, on the application of a testamentary or other guardian or next friend of the infant, either generally or in a particular instance, orders.

Tenant for life, infant.

61.—(1.) The foregoing provisions of this Act do not apply in the case of a married woman.

Married woman, how to be affected.

(2.) Where a married woman who, if she had not been a married woman, would have been a tenant for life or would have had the powers of a tenant for life under the foregoing provisions of this Act, is entitled for her separate use, or is entitled under any statute, passed or to be passed, for her separate property, or as a *feme sole*, then she, without her husband, shall have the powers of a tenant for life under this Act.

(3.) Where she is entitled otherwise than as aforesaid, then she and her husband together shall have the powers of a tenant for life under this Act.

(4.) The provisions of this Act referring to a tenant for life and a settlement and settled land shall extend to the married woman without her husband, or to her and her husband together, as the case may require, and to the instrument under which her estate or interest arises, and to the land therein comprised.

(5.) The married woman may execute, make, and do all deeds, instruments, and things necessary or proper for giving effect to the provisions of this section.

(6.) A restraint on anticipation in the settlement shall not prevent the exercise by her of any power under this Act.

62. Where a tenant for life, or a person having the powers of a tenant for life under this Act, is a lunatic, so found by inquisition, the committee of his estate may, in his name and on his behalf, under an order of the Lord Chancellor, or other person intrusted by virtue of

Tenant for life, lunatic.

45 & 46 Vict. c. 38.

the Queen's Sign Manual with the care and commitment of the custody of the persons and estates of lunatics, exercise the powers of a tenant for life under this Act; and the order may be made on the petition of any person interested in the settled land, or of the committee of the estate.

XV.—Settlement by way of Trusts for Sale.

Provision for case of trust to sell and re-invest in land.

63.—(1.) Any land, or any estate or interest in land, which under or by virtue of any deed, will, or agreement, covenant to surrender, copy of court roll, Act of Parliament, or other instrument, or any number of instruments, whether made or passed before or after, or partly before and partly after, the commencement of this Act, is subject to a trust or direction for sale of that land, estate, or interest, and for the application or disposal of the money to arise from the sale, or the income of that money, or the income of the land until sale, or any part of that money or income, for the benefit of any person for his life, or any other limited period, or for the benefit of two or more persons concurrently for any limited period, and whether absolutely, or subject to a trust for accumulation of income for payment of debts or other purpose, or to any other restriction, shall be deemed to be settled land, and the instrument or instruments under which the trust arises shall be deemed to be a settlement; and the person for the time being beneficially entitled to the income of the land, estate, or interest aforesaid until sale, whether absolutely or subject as aforesaid, shall be deemed to be tenant for life thereof; or if two or more persons are so entitled concurrently, then those persons shall be deemed to constitute together the tenant for life thereof; and the persons, if any, who are for the time being under the settlement trustees for sale of the settled land, or having power of consent to, or approval of, or control over the sale, or if under the settlement there are no such trustees, then the persons, if any, for the time being, who are by the settlement declared to be trustees thereof for purposes of this Act are for purposes of this Act trustees of the settlement.

(2.) In every such case the provisions of this Act referring to a tenant for life, and to a settlement, and to settled land, shall extend to the person or persons aforesaid, and to the instrument or instruments under which his or their estate or interest arises, and to the land therein comprised, subject and except as in this section provided (that is to say):

(i.) Any reference in this Act to the predecessors or successors in title of the tenant for life, or to the remaindermen, or reversioners or other persons interested in the settled land, shall be deemed to refer to the persons interested in succession or otherwise in the money to arise from sale of the land, or the income of that money, or the income of the land, until sale (as the case may require).

(ii.) Capital money arising under this Act from the settled land shall not be applied in the purchase of land unless such application is authorized by the settlement in the case of capital money arising thereunder from sales or other dispositions of the settled land, but may, in addition to any other mode of application authorized by this Act, be applied in any mode in which capital money arising under the settlement from any such sale or other disposition is applicable thereunder, subject to any consent required or direction given by the settlement with respect to the application of trust money of the settlement. 45 & 46 Vict. c. 38.

(iii.) Capital money arising under this Act from the settled land and the securities in which the same is invested, shall not for any purpose of disposition, transmission, or devolution, be considered as land unless the same would, if arising under the settlement from a sale or disposition of the settled land, have been so considered, and the same shall be held in trust for and shall go to the same persons successively in the same manner, and for and on the same estates, interests, and trusts as the same would have gone and been held if arising under the settlement from a sale or disposition of the settled land, and the income of such capital money and securities shall be paid or applied accordingly.

(iv.) Land of whatever tenure acquired under this Act by purchase, or in exchange, or on partition, shall be conveyed to and vested in the trustees of the settlement, on the trusts, and subject to the powers and provisions which, under the settlement or by reason of the exercise of any power of appointment or charging therein contained, are subsisting with respect to the settled land, or would be so subsisting if the same had not been sold, or as near thereto as circumstances permit, but so as not to increase or multiply charges or powers of charging.

XVI.—Repeals.

Repeal of enactments in schedule.

64.—(1.) The enactments described in the schedule to this Act are hereby repealed.

(2.) The repeal by this Act of any enactment shall not affect any right accrued or obligation incurred thereunder before the commencement of this Act; nor shall the same affect the validity or invalidity, or any operation, effect, or consequence, of any instrument executed or made, or of anything done or suffered, or of any order made, before the commencement of this Act; nor shall the same affect any action, proceeding, or thing then pending or uncompleted; and every such action, proceeding, and thing may be carried on and completed as if there had been no such repeal in this Act.

45 & 46 Vict. c. 38.

XVII.—Ireland.

Modifications respecting Ireland.

65.—(1.) In the application of this Act to Ireland the foregoing provisions shall be modified as in this section provided.

(2.) The Court shall be Her Majesty's High Court of Justice in Ireland.

(3.) All matters within the jurisdiction of that Court shall, subject to the Acts regulating that Court, be assigned to the Chancery Division of that Court; but General Rules under this Act for Ireland may direct that those matters or any of them be assigned to the Land Judges of that Division.

(4.) Any deed inrolled under this Act shall be inrolled in the Record and Writ Office of that Division.

40 & 41 Vict. c. 57.

(5.) General Rules for purposes of this Act for Ireland shall be deemed Rules of Court within the Supreme Court of Judicature Act (Ireland), 1877, and may be made accordingly, at any time after the passing of this Act, to take effect on or after the commencement of this Act.

(6.) The several Civil Bill Courts in Ireland shall, in addition to the jurisdiction possessed by them independently of this Act, have and exercise the power and authority exerciseable by the Court under this Act, in all proceedings where the property, the subject of the proceedings, does not exceed in capital value five hundred pounds, or in annual value thirty pounds.

40 & 41 Vict. c. 56.

(7.) The provisions of Part II. of the County Officers and Courts (Ireland) Act, 1877, relative to the equitable jurisdiction of the Civil Bill Courts, shall apply to the jurisdiction exerciseable by those Courts under this Act.

(8.) Rules and Orders for purposes of this Act, as far as it relates to the Civil Bill Courts, may be made at any time after the passing of this Act, to take effect on or after the commencement of this Act, in manner prescribed by section seventy-nine of the County Officers and Courts (Ireland) Act, 1877.

(9.) The Commissioners of Public Works in Ireland shall be substituted for the Land Commissioners.

(10.) The term for which a lease other than a building or mining lease may be granted shall be not exceeding thirty-five years.

45 & 46 Vict. c. 38.

THE SCHEDULE.

S. 64.

REPEALS

3 & 24 Vict. c. 145. in part.	An Act to give to trustees, mortgagees, and others, certain powers now commonly inserted in settlements, mortgages, and wills	in part; namely,— Parts I. and IV. (being so much of the Act as is not repealed by the Conveyancing and Law of Property Act, 1881).
27 & 28 Vict. c. 114. in part.	The Improvement of Land Act, 1864 -	in part; namely,— Sections seventeen and eighteen: Section twenty-one, from "either by a party" to "benefice) or" (inclusive); and from "or if the land owner" to "minor or minors" (inclusive); and "or circumstance" (twice): Except as regards Scotland.
40 & 41 Vict. c. 18. in part.	The Settled Estates Act, 1877 -	in part; namely,— Section seventeen.

THE SETTLED LAND ACT, 1884.

47 & 48 Vict. c. 18.

[47 & 48 VICT. CH. 18.]

An Act to Amend the Settled Land Act, 1882.

[3rd July, 1884.]

BE it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. This Act may be cited as the Settled Land Act, 1884. Short title.

2. The expression "the Act of 1882" used in this Act means the Settled Land Act, 1882. Interpretation.

3. The Act of 1882 and this Act are to be read and construed together as one Act, and expressions used in this Act are to have the same meanings as those attached by the Act of 1882 to similar expressions used therein. Construction of Act.

47 & 48 Vict. c. 18.

Fine on a lease to be capital money.

4. A fine received on the grant of a lease under any power conferred by the Act of 1882 is to be deemed capital money arising under that Act.

Notice under 45 & 46 Vict. c. 38, s. 45, may, as to a sale, exchange, partition, or lease, be general.

5.—(1.) The notice required by section forty-five of the Act of 1882 of intention to make a sale, exchange, partition, or lease may be notice of a general intention in that behalf.

(2.) The tenant for life is, upon request by a trustee of the settlement, to furnish to him such particulars and information as may reasonably be required by him from time to time with reference to sales, exchanges, partitions, or leases effected, or in progress, or immediately intended.

(3.) Any trustee, by writing under his hand, may waive notice either in any particular case, or generally, and may accept less than one month's notice.

(4.) This section applies to a notice given before, as well as to a notice given after, the passing of this Act.

(5.) Provided that a notice, to the sufficiency of which objection has been taken before the passing of this Act, is not made sufficient by virtue of this Act.

As to consents of tenants for life.

6.—(1.) In the case of a settlement within the meaning of section sixty-three of the Act of 1882, any consent not required by the terms of the settlement is not by force of anything contained in that Act to be deemed necessary to enable the trustees of the settlement, or any other person, to execute any of the trusts or powers created by the settlement.

(2.) In the case of every other settlement, not within the meaning of section sixty-three of the Act of 1882, where two or more persons together constitute the tenant for life for the purposes of that Act, then, notwithstanding anything contained in subsection (2) of section fifty-six of that Act, requiring the consent of all those persons, the consent of one only of those persons is by force of that section to be deemed necessary to the exercise by the trustees of the settlement, or by any other person, of any power conferred by the settlement exerciseable for any purpose provided for in that Act.

(3.) This section applies to dealings before, as well as after, the passing of this Act.

Powers given by s. 63 to be exercised only with leave of the Court.

7. With respect to the powers conferred by section sixty-three of the Act of 1882, the following provisions are to have effect:—

(i.) Those powers are not to be exercised without the leave of the Court.

(ii.) The Court may by order, in any case in which it thinks fit, give leave to exercise all or any of those powers, and the order is to name the person or persons to whom leave is given.

(iii.) The Court may from time to time rescind, or vary, any order made under this section, or may make any new or further order.

(iv.) So long as an order under this section is in force, neither the

trustees of the settlement, nor any person other than a person having the leave, shall execute any trust or power created by the settlement, for any purpose for which leave is by the order given, to exercise a power conferred by the Act of 1882. 47 & 48 Vict. c. 18.

(v.) An order under this section may be registered and re-registered, as a lis pendens, against the trustees of the settlement named in the order, describing them on the register as "Trustees for the purposes of the Settled Land Act, 1882."

(vi.) Any person dealing with the trustees from time to time, or with any other person acting under the trusts or powers of the settlement, is not to be affected by an order under this section, unless and until the order is duly registered, and when necessary re-registered as a lis pendens.

(vii.) An application to the Court under this section may be made by the tenant for life, or by the persons who together constitute the tenant for life, within the meaning of section sixty-three of the Act 1882.

(viii.) An application to rescind or vary an order, or to make any new or further order under this section, may be made also by the trustees of the settlement, or by any person beneficially interested under the settlement.

(ix.) The person or persons to whom leave is given by an order under this section, shall be deemed the proper person or persons to exercise the powers conferred by section sixty-three of the Act of 1882, and shall have, and may exercise those powers accordingly.

(x.) This section is not to affect any dealing which has taken place before the passing of this Act, under any trust or power to which this section applies.

Curtesy to be deemed to arise under settlement.

8. For the purposes of the Act of 1882 the estate of a tenant by the curtesy is to be deemed an estate arising under a settlement made by his wife.

THE SETTLED LAND ACTS (AMENDMENT) ACT, 1887.

50 & 51 Vict. c. 30.

[50 & 51 VICT. CH. 30.]

An Act to amend the Settled Land Act.

WHEREAS by the twenty-first section of the Settled Land Act, 1882 (in this Act referred to as the Act of 1882), it is provided that capital money arising under that Act may be applied in payment for any improvement by that Act authorised; 45 & 46 Vict. c. 38.

50 & 51 Vict. c. 30.

Be it therefore enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and the Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Amendment of s. 21 of the Settled Land Act, 1882.

1. Where any improvement of a kind authorised by the Act 1882 has been or may be made either before or after the passing of this Act, and a rentcharge, whether temporary or perpetual, has been or may be created in pursuance of any Act of Parliament, with the object of paying off any moneys advanced for the purpose of defraying the expenses of such improvement, any capital money expended in redeeming such rentcharge, or otherwise providing for the payment thereof, shall be deemed to be applied in payment for an improvement authorised by the Act of 1882.

Section 28 of Settled Land Act, 1882, to apply to improvements within preceding section.

2. Any improvement in payment for which capital money is applied or deemed to be applied under the provisions of the preceding section shall be deemed to be an improvement within the meaning of section twenty-eight of the Act of 1882, and the provisions of such last-mentioned section shall, so far as applicable, be deemed to apply to such improvement.

Short title.

3. This Act shall be construed as one with the Settled Land Act, 1882, and the Settled Land Act, 1884, and may be cited together with those Acts as the Settled Land Acts, 1882 to 1887, and separately as the Settled Land Acts (Amendment) Act, 1887.

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52 & 53 Vict. c. 36.

THE SETTLED LAND ACT, 1889.

[52 & 53 VICT. CH. 36.]

An Act to amend the Settled Land Act, 1882.

[12th August, 1889.]

BE it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same as follows:

Construction and short title.

1. This Act shall be construed as one with the Settled Land Acts, 1882 to 1887, and may be cited together with those Acts, as the Settled Land Acts, 1882 to 1889, and separately as the Settled Land Act, 1889.

Option of purchase in building lease. 45 & 46 Vict. c. 38.

2. Any building lease, and any agreement for granting building leases, under the Settled Land Act, 1882, may contain an option to be exercised at any time within an agreed number of years not exceeding ten, for the lessee to purchase the land leased at a price fixed at the

time of the making of the lease or agreement for the lease, such price to be the best which having regard to the rent reserved can reasonably be obtained, and to be either a fixed sum of money or such a sum of money as shall be equal to a stated number of years purchase of the highest rent reserved by the lease or agreement. 52 & 53 Vict. c. 36.

3 Such price when received shall for all purposes be capital money arising under the Settled Land Act, 1882. Price to be capital money.

THE SETTLED LAND ACT, 1890.

53 & 54 Vict. c. 69.

[53 & 54 VICT. CH. 69.]

An Act to amend the Settled Land Acts, 1882 *to* 1889.

BE it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Preliminary.

1. This Act may be cited as the Settled Land Act, 1890. Short title.

2. The Settled Land Acts, 1882 to 1889, and this Act are to be read and construed together as one Act, and may be cited as the Settled Land Acts, 1882 to 1890. Acts to be construed together.

3. Expressions used in this Act are to have the same meanings as those attached by the Settled Land Acts, 1882 to 1889, to similar expressions used therein. Interpretation.

Definitions.

4.—(1.) Every instrument whereby a tenant for life, in consideration of marriage or as part or by way of any family arrangement, not being a security for payment of money advanced, makes an assignment of or creates a charge upon his estate or interest under the settlement is to be deemed one of the instruments creating the settlement, and not an instrument vesting in any person any right as assignee for value within the meaning or operation of section fifty of the Act of 1882. Instrument in consideration of marriage, &c., to be part of the settlement. 45 & 46 Vict. c. 38.

(2.) This section is to apply and have effect with respect to every disposition before as well as after the passing of this Act, unless inconsistent with the nature or terms of the disposition.

Exchanges.

5. On an exchange or partition any easement, right, or privilege of any kind may be reserved or may be granted over or in relation Creation of easements on exchange or partition.

53 & 54 Vict. c. 69.

to the settled land or any part thereof, or other land or an easement, right, or privilege of any kind may be given, or taken in exchange or on partition for land or for any other easement, right, or privilege of any kind.

Completion of Contracts.

Power to complete predecessor's contract.

6. A tenant for life may make any conveyance which is necessary or proper for giving effect to a contract entered into by a predecessor in title, and which if made by such predecessor would have been valid as against his successors in title.

Leases.

Provision as to leases for 21 years.

7. A lease for a term not exceeding twenty-one years at the best rent that can be reasonably obtained without fine, and whereby the lessee is not exempted from punishment for waste, may be made by a tenant for life—

(i.) Without any notice of an intention to make the same having been given under section forty-five of the Act of 1882; and

45 & 46 Vict. c. 38.

(ii.) Notwithstanding that there are no trustees of the settlement for the purposes of the Settled Land Acts, 1882 to 1890; and

(iii.) By any writing under hand only containing an agreement instead of a covenant by the lessee for payment of rent in cases where the term does not extend beyond three years from the date of the writing.

Provision as to mining leases.

8. In a mining lease—

(i.) The rent may be made to vary according to the price of the minerals or substances gotten, or any of them:

(ii.) Such price may be the saleable value, or the price or value appearing in any trade or market or other price list or return from time to time, or may be the marketable value as ascertained in any manner prescribed by the lease (including a reference to arbitration), or may be an average of any such prices or values taken during a specified period.

Power to reserve a rentcharge on a grant in fee simple.

9. Where, on a grant for building purposes by a tenant for life, the land is expressed to be conveyed in fee simple with or subject to a reservation thereout of a perpetual rent or rentcharge, the reservation shall operate to create a rentcharge in fee simple issuing out of the land conveyed, and having incidental thereto all powers and remedies for recovery thereof conferred by section forty-four of the Conveyancing and Law of Property Act, 1881, and the rentcharge so created shall go and remain to the uses on the trusts and subject to the powers and provisions which, immediately before the conveyance, were subsisting with respect to the land out of which it is reserved.

44 & 45 Vict. c. 41.

Mansion and Park.

53 & 54 Vict. c. 69.

Restriction on sale of mansion.

10.—(1.) From and after the passing of this Act section fifteen of the Act of 1882, relating to the sale or leasing of the principal mansion house, shall be and the same is hereby repealed.

(2.) Notwithstanding anything contained in the Act of 1882, the principal mansion house (if any) on any settled land, and the pleasure grounds and park and lands (if any) usually occupied therewith, shall not be sold, exchanged, or leased by the tenant for life without the consent of the trustees of the settlement or an order of the Court.

(3.) Where a house is usually occupied as a farmhouse, or where the site of any house and the pleasure grounds and park and lands (if any) usually occupied therewith do not together exceed twenty-five acres in extent, the house is not to be deemed a principal mansion house within the meaning of this section.

The Raising of Money.

Power to raise money by mortgage.

11.—(1) Where money is required for the purpose of discharging an incumbrance on the settled land or part thereof, the tenant for life may raise the money so required, and also the amount properly required for payment of the costs of the transaction on mortgage of the settled land, or of any part thereof, by conveyance of the fee-simple or other estate or interest the subject of the settlement, or by creation of a term of years in the settled land, or any part thereof, or otherwise, and the money so raised shall be capital money for that purpose, and may be paid or applied accordingly.

(2.) Incumbrance in this section does not include any annual sum payable only during a life or lives or during a term of years absolute or determinable.

Dealings as between Tenant for Life and the Estate.

Provision enabling dealings with tenant for life.

12. Where a sale of settled land is to be made to the tenant for life, or a purchase is to be made from him of land to be made subject to the limitations of the settlement, or an exchange is to be made with him of settled land for other land, or a partition is to be made with him of land an undivided share whereof is subject to the limitations of the settlement, the trustees of the settlement shall stand in the place of and represent the tenant for life, and shall, in addition to their powers as trustees, have all the powers of the tenant for life in reference to negotiating and completing the transaction.

Application of Capital Money.

Application of capital money.

13. Improvements authorised by the Act of 1882 shall include the following; namely,

(i.) Bridges;

53 & 54 Vict. c. 69.

(ii.) Making any additions to or alterations in buildings reasonably necessary or proper to enable the same to be let;

(iii.) Erection of buildings in substitution for buildings within an urban sanitary district taken by a local or other public authority, or for buildings taken under compulsory powers, but so that no more money be expended than the amount received for the buildings taken and the site thereof;

(iv.) The rebuilding of the principal mansion house on the settled land: Provided that the sum to be applied under this sub-section shall not exceed one half of the annual rental of the settled land.

Capital money in Court may be paid out to trustees.

14. All or any part of any capital money paid into Court may, if the Court thinks fit, be at any time paid out to the trustees of the settlement for the purposes of the Settled Land Acts, 1882 to 1890.

Court may order payment for improvements executed.

15. The Court may, in any case where it appears proper, make an order directing or authorising capital money to be applied in or towards payment for any improvement authorised by the Settled Land Acts, 1882 to 1890, notwithstanding that a scheme was not, before the execution of the improvement, submitted for approval, as required by the Act of 1882, to the trustees of the settlement or to the Court.

Trustees.

Trustees for the purposes of the Act.

16. Where there are for the time being no trustees of the settlement within the meaning and for the purposes of the Act of 1882, then the following persons shall, for the purposes of the Settled Land Acts, 1882 to 1890, be trustees of the settlement; namely,

(i.) The persons (if any) who are for the time being under the settlement trustees, with power of or upon trust for sale of any other land comprised in the settlement and subject to the same limitations as the land to be sold, or with power of consent to or approval of the exercise of such a power of sale, or, if there be no such persons, then

(ii.) The persons (if any) who are for the time being under the settlement trustees with future power of sale, or under a future trust for sale of the land to be sold, or with power of consent to or approval of the exercise of such a future power of sale, and whether the power or trust takes effect in all events or not.

Application of provisions of 44 & 45 Vict. c. 41, as to appointment of trustees.

17.—(1.) All the powers and provisions contained in the Conveyancing and Law of Property Act, 1881, with reference to the appointment of new trustees, and the discharge and retirement of trustees, are to apply to and include trustees for the purposes of the Settled Land Acts, 1882 to 1890, whether appointed by the Court or by the settlement, or under provisions contained in the settlement.

(2.) This section applies and is to have effect with respect to an appointment or a discharge and retirement of trustees taking place before as well as after the passing of this Act. 53 & 54 Vict. c. 93.

(3.) This section is not to render invalid or prejudice any appointment or any discharge and retirement of trustees effected before the passing of this Act otherwise than under the provisions of the Conveyancing and Law of Property Act, 1881.

18. The provisions of section eleven (*a*) of the Housing of the Working Classes Act, 1885, and of any enactment which may be substituted therefor, shall have effect as if the expression "working classes" included all classes of persons who earn their livelihood by wages or salaries: Provided that this section shall apply only to buildings of a rateable value not exceeding one hundred pounds per annum. Extension of meaning of "working classes" in 48 & 49 Vict. c. 72.

19. The registration of a writ or order affecting land may be vacated pursuant to an order of the High Court or any judge thereof. Power to vacate registration of writ.

THE MARRIED WOMEN'S PROPERTY ACT, 1882.

[45 & 46 VICT. CH. 75.]

45 & 46 Vict. c. 75.

An Act to consolidate and amend the Acts relating to the Property of Married Women. [18th August, 1882.]

WHEREAS it is expedient to consolidate and amend the Act of the thirty-third and thirty-fourth Victoria, chapter ninety-three, intituled "The Married Women's Property Act, 1870," and the Act of the thirty-seventh and thirty-eighth Victoria, chapter fifty, intituled "An Act to amend the Married Women's Property Act (1870)":

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

1.—(1.) A married woman shall, in accordance with the provisions of this Act, be capable of acquiring, holding, and disposing by will or otherwise, of any real or personal property as her separate property, in the same manner as if she were a *feme sole*, without the intervention of any trustee. Married woman to be capable of holding property and of contracting as a *feme sole*.

(2.) A married woman shall be capable of entering into and rendering herself liable in respect of and to the extent of her separate property on

(*a*) By the Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), this section is among others repealed and the other provisions are substituted, see p. 74.

45 & 46 Vict. c 75.

any contract, and of suing and being sued, either in contract or in tort, or otherwise, in all respects as if she were a *feme sole*, and her husband need not be joined with her as plaintiff or defendant, or be made a party to any action or other legal proceeding brought by or taken against her: and any damages or costs recovered by her in any such action or proceeding shall be her separate property; and any damages or costs recovered against her in any such action or proceeding shall be payable out of her separate property, and not otherwise.

(3.) Every contract entered into by a married woman shall be deemed to be a contract entered into by her with respect to and to bind her separate property, unless the contrary be shown.

(4.) Every contract entered into by a married woman with respect to and to bind her separate property shall bind not only the separate property which she is possessed of or entitled to at the date of the contract, but also all separate property which she may thereafter acquire.

(5.) Every married woman carrying on a trade separately from her husband shall, in respect of her separate property, be subject to the bankruptcy laws in the same way as if she were a *feme sole*.

Property of a woman married after the Act to be held by her as a *feme sole*.

2. Every woman who marries after the commencement of this Act shall be entitled to have and to hold as her separate property and to dispose of in manner aforesaid all real and personal property which shall belong to her at the time of marriage, or shall be acquired by or devolve upon her after marriage, including any wages, earnings, money, and property gained or acquired by her in any employment, trade, or occupation, in which she is engaged, or which she carries on separately from her husband, or by the exercise of any literary, artistic, or scientific skill.

Loans by wife to husband.

3. Any money or other estate of the wife lent or entrusted by her to her husband for the purpose of any trade or business carried on by him, or otherwise, shall be treated as assets of her husband's estate in case of his bankruptcy, under reservation of the wife's claim to a dividend as a creditor for the amount or value of such money or other estate after, but not before, all claims of the other creditors of the husband for valuable consideration in money or money's worth have been satisfied.

Execution of general power.

4. The execution of a general power by will by a married woman shall have the effect of making the property appointed liable for her debts and other liabilities in the same manner as her separate estate is made liable under this Act.

Property acquired after the Act by a woman married before the Act to be held by her as a *feme sole*.

5. Every woman married before the commencement of this Act shall be entitled to have and to hold and to dispose of in manner aforesaid as her separate property all real and personal property, her title to which, whether vested or contingent, and whether in possession, reversion, or remainder, shall accrue after the commencement of this Act, including any wages, earnings, money, and property so gained or acquired by her as aforesaid.

As to stock, &c., to which a married woman is entitled.

6. All deposits in any post office or other savings bank, or in any other bank, all annuities granted by the Commissioners for the Reduction of the National Debt or by any other person, and all sums forming part of the public stocks or funds, or of any other stocks or funds transferable in the books of the Governor and Company of the Bank of England, or of any other bank, which at the commencement of this Act are standing in the sole name of a married woman, and all shares, stock, debentures, debenture stock, or other interests of or in any corporation, company, or public body, municipal, commercial, or otherwise, or of or in any industrial, provident, friendly, benefit, building, or loan society, which at the commencement of this Act are standing in her name, shall be deemed, unless and until the contrary be shown, to be the separate property of such married woman; and the fact that any such deposit, annuity, sum forming part of the public stocks or funds, or of any other stocks or funds transferable in the books of the Governor and Company of the Bank of England or of any other bank, share, stock, debenture, debenture stock, or other interest as aforesaid, is standing in the sole name of a married woman, shall be sufficient *primâ facie* evidence that she is beneficially entitled thereto for her separate use, so as to authorise and empower her to receive or transfer the same, and to receive the dividends, interests, and profits thereof, without the concurrence of her husband, and to indemnify the Postmaster General, the Commissioners for the Reduction of the National Debt, the Governor and Company of the Bank of England, the Governor and Company of the Bank of Ireland, and all directors, managers, and trustees of every such bank, corporation, company, public body, or society as aforesaid, in respect thereof.

As to stock, &c., to be transferred, &c., to a married woman.

7. All sums forming part of the public stocks or funds, or of any other stocks or funds transferable in the books of the Bank of England or of any other bank, and all such deposits and annuities respectively as are mentioned in the last preceding section, and all shares, stock, debentures, debenture stock, and other interests of or in any such corporation, company, public body, or society as aforesaid, which after the commencement of this Act shall be allotted to or placed, registered, or transferred in or into or made to stand in the sole name of any married woman shall be deemed, unless and until the contrary be shown, to be her separate property, in respect of which so far as any liability may be incident thereto her separate estate shall alone be liable, whether the same shall be so expressed in the document whereby her title to the same is created or certified, or in the books or register wherein her title is entered or recorded, or not.

Provided always, that nothing in this Act shall require or authorise any corporation or joint stock company to admit any married woman to be a holder of any shares or stock therein to which any liability may be incident, contrary to the provisions of any Act of Parliament, charter,

45 & 46 Vict. c. 75.

byelaw, articles of association, or deed of settlement regulating such corporation or company.

Investments in joint names of married women and others.

8. All the provisions herein-before contained as to deposits in any post office or other savings bank, or in any other bank, annuities granted by the Commissioners for the Reduction of the National Debt or by any other person, sums forming part of the public stocks or funds, or of any other stocks or funds transferable in the books of the Bank of England or of any other bank, shares, stock, debentures, debenture stock, or other interests of or in any such corporation, company, public body, or society as aforesaid respectively, which at the commencement of this Act shall be standing in the sole name of a married woman, or which, after that time, shall be allotted to, or placed, registered, or transferred to or into, or made to stand in, the sole name of a married woman, shall respectively extend and apply, so far as relates to the estate, right, title, or interest of the married woman, to any of the particulars aforesaid which, at the commencement of this Act, or at any time afterwards, shall be standing in, or shall be allotted to, placed, registered, or transferred to or into, or made to stand in, the name of any married woman jointly with any persons or person other than her husband.

As to stock, &c., standing in the joint names of a married woman and others.

9. It shall not be necessary for the husband of any married woman, in respect of her interest, to join in the transfer of any such annuity or deposit as aforesaid, or any sum forming part of the public stocks or funds, or of any other stocks or funds transferable as aforesaid, or any share, stock, debenture, debenture stock, or other benefit, right, claim, or other interest of or in any such corporation, company, public body, or society as aforesaid, which is now or shall at any time hereafter be standing in the sole name of any married woman, or in the joint names of such married woman and any other person or persons not being her husband.

Fraudulent investments with money of husband.

10. If any investment in any such deposit or annuity as aforesaid, or in any of the public stocks or funds, or in any other stocks or funds transferable as aforesaid, or in any share, stock, debenture, or debenture stock of any corporation, company, or public body, municipal, commercial, or otherwise, or in any share, debenture, benefit, right, or claim whatsoever in, to, or upon the funds of any industrial, provident, friendly, benefit, building, or loan society, shall have been made by a married woman by means of moneys of her husband, without his consent, the Court may, upon an application under section seventeen of this Act, order such investment, and the dividends thereof, or any part thereof, to be transferred and paid respectively to the husband; and nothing in this Act contained shall give validity as against creditors of the husband to any gift, by a husband to his wife, of any property, which, after such gift, shall continue to be in the order and disposition or reputed ownership of the husband, or to any deposit or other investment of moneys of the husband made by or in the name of his wife in

fraud of his creditors; but any moneys so deposited or invested may be followed as if this Act had not passed.

Moneys payable under policy of assurance not to form part of estate of the insured.

11. A married woman may by virtue of the power of making contracts herein-before contained effect a policy upon her own life or the life of her husband for her separate use; and the same and all benefit thereof shall enure accordingly.

A policy of assurance effected by any man on his own life, and expressed to be for the benefit of his wife, or of his children, or of his wife and children, or any of them, or by any woman on her own life, and expressed to be for the benefit of her husband, or of her children, or of her husband and children, or any of them, shall create a trust in favour of the objects therein named, and the moneys payable under any such policy shall not, so long as any object of the trust remains unperformed, form part of the estate of the insured, or be subject to his or her debts: Provided, that if it shall be proved that the policy was effected and the premiums paid with intent to defraud the creditors of the insured, they shall be entitled to receive, out of the moneys payable under the policy, a sum equal to the premiums so paid. The insured may by the policy, or by any memorandum under his or her hand, appoint a trustee or trustees of the moneys payable under the policy, and from time to time appoint a new trustee or new trustees thereof, and may make provision for the appointment of a new trustee or new trustees thereof, and for the investment of the moneys payable under any such policy. In default of any such appointment of a trustee, such policy, immediately on its being effected, shall vest in the insured and his or her legal personal representatives, in trust for the purposes aforesaid. If, at the time of the death of the insured, or at any time afterwards, there shall be no trustee, or it shall be expedient to appoint a new trustee or new trustees, a trustee or trustees or a new trustee or new trustees may be appointed by any court having jurisdiction under the provisions of the Trustee Act, 1850, or the Acts amending and extending the same. The receipt of a trustee or trustees duly appointed, or, in default of any such appointment, or in default of notice to the insurance office, the receipt of the legal personal representative of the insured shall be a discharge to the office for the sum secured by the policy, or for the value thereof, in whole or in part.

13 & 14 Vict. c. 60.

Remedies of married woman for protection and security of separate property.

12. Every woman, whether married before or after this Act, shall have in her own name against all persons whomsoever, including her husband, the same civil remedies, and also (subject, as regards her husband, to the proviso herein-after contained) the same remedies and redress by way of criminal proceedings, for the protection and security of her own separate property, as if such property belonged to her as a *feme sole*, but, except as aforesaid, no husband or wife shall be entitled to sue the other for a tort. In any indictment or other proceeding under this section it shall be sufficient to allege such property to be her property; and in any

45 & 46 Vict. c. 75.

proceeding under this section a husband or wife shall be competent to give evidence against each other, any statute or rule of law to the contrary notwithstanding: Provided always, that no criminal proceeding shall be taken by any wife against her husband by virtue of this Act while they are living together, as to or concerning any property claimed by her, nor while they are living apart, as to or concerning any act done by the husband while they were living together, concerning property claimed by the wife, unless such property shall have been wrongfully taken by the husband when leaving or deserting, or about to leave or desert, his wife.

Wife's antenuptial debts and liabilities.

13. A woman after her marriage shall continue to be liable in respect and to the extent of her separate property for all debts contracted, and all contracts entered into or wrongs committed by her before her marriage, including any sums for which she may be liable as a contributory, either before or after she has been placed on the list of contributories, under and by virtue of the Acts relating to joint stock companies; and she may be sued for any such debt and for any liability in damages or otherwise under any such contract, or in respect of any such wrong; and all sums recovered against her in respect thereof, or for any costs relating thereto, shall be payable out of her separate property; and, as between her and her husband, unless there be any contract between them to the contrary, her separate property shall be deemed to be primarily liable for all such debts, contracts, or wrongs, and for all damages or costs recovered in respect thereof: Provided always, that nothing in this Act shall operate to increase or diminish the liability of any woman married before the commencement of this Act for any such debt, contract, or wrong, as aforesaid, except as to any separate property to which she may become entitled by virtue of this Act, and to which she would not have been entitled for her separate use under the Acts hereby repealed or otherwise, if this Act had not passed.

Husband to be liable for his wife's debts contracted before marriage to a certain extent.

14. A husband shall be liable for the debts of his wife contracted, and for all contracts entered into and wrongs committed by her, before marriage, including any liabilities to which she may be so subject under the Acts relating to joint stock companies as aforesaid, to the extent of all property whatsoever belonging to his wife which he shall have acquired or become entitled to from or through his wife, after deducting therefrom any payments made by him, and any sums for which judgment may have been *bonâ fide* recovered against him in any proceeding at law, in respect of any such debts, contracts, or wrongs for or in respect of which his wife was liable before her marriage as aforesaid; but he shall not be liable for the same any further or otherwise; and any court in which a husband shall be sued for any such debt shall have power to direct any inquiry or proceedings which it may think proper for the purpose of ascertaining the nature, amount, or value of such property: Provided always, that nothing in this Act contained

shall operate to increase or diminish the liability of any husband married before the commencement of this Act for or in respect of any such debt or other liability of his wife as aforesaid.

Suits for ante-nuptial liabilities.

15. A husband and wife may be jointly sued in respect of any such debt or other liability (whether by contract or for any wrong) contracted or incurred by the wife before marriage as aforesaid, if the plaintiff in the action shall seek to establish his claim, either wholly or in part, against both of them; and if in any such action, or in any action brought in respect of any such debt or liability against the husband alone, it is not found that the husband is liable in respect of any property of the wife so acquired by him or to which he shall have become so entitled as aforesaid, he shall have judgment for his costs of defence, whatever may be the result of the action against the wife if jointly sued with him; and in any such action against husband and wife jointly, if it appears that the husband is liable for the debt or damages recovered, or any part thereof, the judgment to the extent of the amount for which the husband is liable shall be a joint judgment against the husband personally and against the wife as to her separate property; and as to the residue, if any, of such debt and damages, the judgment shall be a separate judgment against the wife as to her separate property only.

Act of wife liable to criminal proceedings.

16. A wife doing any act with respect to any property of her husband, which, if done by the husband with respect to property of the wife, would make the husband liable to criminal proceedings by the wife under this Act, shall in like manner be liable to criminal proceedings by her husband.

Questions between husband and wife as to property to be decided in a summary way.

17. In any question between husband and wife as to the title to or possession of property, either party, or any such bank, corporation, company, public body, or society as aforesaid in whose books any stocks, funds or shares of either party are standing, may apply by summons or otherwise in a summary way to any judge of the High Court of Justice in England or in Ireland, according as such property is in England or Ireland, or (at the option of the applicant irrespectively of the value of the property in dispute) in England to the judge of the county court of the district, or in Ireland to the chairman of the civil bill court of the division in which either party resides, and the judge of the High Court of Justice or of the county court, or the chairman of the civil bill court (as the case may be) may make such order with respect to the property in dispute, and as to the costs of and consequent on the application as he thinks fit, or may direct such application to stand over from time to time, and any inquiry touching the matters in question to be made in such manner as he shall think fit: Provided always, that any order of a judge of the High Court of Justice to be made under the provisions of this section shall be subject to appeal in the same way as an order made by the same judge in a suit pending or on an equitable plaint in the said court would be; and any order of a county or civil bill court

45 & 46 Vict. c. 75.

under the provisions of this section shall be subject to appeal in the same way as any other order made by the same court would be, and all proceedings in a county court or civil bill court under this section in which, by reason of the value of the property in dispute, such court would not have had jurisdiction if this Act or the Married Women's Property Act, 1870, had not passed, may, at the option of the defendant or respondent to such proceedings, be removed as of right into the High Court of Justice in England or Ireland (as the case may be), by writ of *certiorari* or otherwise as may be prescribed by any rule of such High Court; but any order made or act done in the course of such proceedings prior to such removal shall be valid, unless order shall be made to the contrary by such High Court: Provided also, that the judge of the High Court of Justice or of the county court, or the chairman of the civil bill court, if either party so require, may hear any such application in his private room: Provided also, that any such bank, corporation, company, public body, or society as aforesaid, shall, in the matter of any such application for the purposes of costs or otherwise, be treated as a stakeholder only.

Married woman as an executrix or trustee.

18. A married woman who is an executrix or administratrix alone or jointly with any other person or persons of the estate of any deceased person, or a trustee alone or jointly as aforesaid of property subject to any trust, may sue or be sued, and may transfer or join in transferring any such annuity or deposit as aforesaid, or any sum forming part of the public stocks or funds, or of any other stocks or funds transferable as aforesaid, or any share, stock, debenture, debenture stock, or other benefit, right, claim, or other interest of or in any such corporation, company, public body, or society in that character, without her husband, as if she were a *feme sole*.

Saving of existing settlements, and the power to make future settlements.

19. Nothing in this Act contained shall interfere with or affect any settlement or agreement for a settlement made or to be made, whether before or after marriage, respecting the property of any married woman, or shall interfere with or render inoperative any restriction against anticipation at present attached or to be hereafter attached to the enjoyment of any property or income by a woman under any settlement, agreement for a settlement, will, or other instrument; but no restriction against anticipation contained in any settlement or agreement for a settlement of a woman's own property to be made or entered into by herself shall have any validity against debts contracted by her before marriage, and no settlement or agreement for a settlement shall have any greater force or validity against creditors of such woman than a like settlement or agreement for a settlement made or entered into by a man would have against his creditors.

Married woman to be liable to the parish for the maintenance of her husband.

20. Where in England the husband of any woman having separate property becomes chargeable to any union or parish, the justices having jurisdiction in such union or parish may, in petty sessions assembled,

upon application of the guardians of the poor, issue a summons against the wife, and make and enforce such order against her for the maintenance of her husband out of such separate property as by the thirty-third section of the Poor Law Amendment Act, 1868, they may now make and enforce against a husband for the maintenance of his wife if she becomes chargeable to any union or parish. Where in Ireland relief is given under the provisions of the Act relating to the relief of the destitute poor to the husband of any woman having separate property, the cost price of such relief is hereby declared to be a loan from the guardians of the union in which the same shall be given, and shall be recoverable from such woman as if she were a *feme sole* by the same actions and proceedings as money lent.

45 & 46 Vict. c. 75.

31 & 32 Vict. c. 122.

21. A married woman having separate property shall be subject to all such liability for the maintenance of her children and grandchildren as the husband is now by law subject to for the maintenance of her children and grandchildren: Provided always, that nothing in this Act shall relieve her husband from any liability imposed upon him by law to maintain her children or grandchildren.

Married woman to be liable to the parish for the maintenance of her children.

22. The Married Women's Property Act, 1870, and the Married Women's Property Act, 1870, Amendment Act, 1874, are hereby repealed: Provided that such repeal shall not affect any act done or right acquired while either of such Acts was in force, or any right or liability of any husband or wife, married before the commencement of this Act, to sue or be sued under the provisions of the said repealed Acts or either of them, for or in respect of any debt, contract, wrong, or other matter or thing whatsoever, for or in respect of which any such right or liability shall have accrued to or against such husband or wife before the commencement of this Act.

Repeal of 33 & 34 Vict. c. 93. 37 & 38 Vict. c. 50.

23. For the purposes of this Act the legal personal representative of any married woman shall in respect of her separate estate have the same rights and liabilities and be subject to the same jurisdiction as she would be if she were living.

Legal representative of married woman.

24. The word "contract" in this Act shall include the acceptance of any trust, or of the office of executrix or administratrix, and the provisions of this Act as to liabilities of married women shall extend to all liabilities by reason of any breach of trust or *devastavit* committed by any married woman being a trustee or executrix or administratrix either before or after her marriage, and her husband shall not be subject to such liabilities unless he has acted or intermeddled in the trust or administration. The word "property" in this Act includes a thing in action.

Interpretation of terms.

25. The date of the commencement of this Act shall be the first of January one thousand eight hundred and eighty-three.

Commencement of Act.

26. This Act shall not extend to Scotland.

Extent of Act.

27. This Act may be cited as the Married Women's Property Act, 1882.

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